Supreme Court, U.S.
FILED
SEP 26 1992
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92-724

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

PHOENIX ENGINEERING, INC.; TENNESSEE ROOFING CORP.; DEL-AIR SERVICE CO., INC.; LLOYD J. BUNCH; J.C. BIBLE; EAST TENNESSEE CHAPTER ASSOCIATED BUILDERS AND CONTRACTORS, INC., ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE, INC., KNOXVILLE BRANCH,

Petitioners,

vs.

MK-FERGUSON OF OAK RIDGE CO.; KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; UNITED STATES OF AMERICA; JAMES D. WATKINS; JOSEPH LaGRONE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal government is prohibited by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, from interfering with the process of collective bargaining in the private sector by requiring private construction employers to sign collective bargaining agreements with a union as a precondition of performing government work.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and order of the Court of Appeals for the Sixth Circuit, rendered in this proceeding on June 11, 1992. A petition for rehearing en banc was denied by the Court of Appeals on July 27, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 966 F.2d 1513 and is reproduced,

together with its order denying Petitioners' request for a rehearing en banc, in the Petitioner's Appendix ("Pet. App.") at 1-A-31-B. The several orders of the United States District Court for the Eastern District of Tennessee are unreported and are reproduced at 32-C-56-G.

JURISDICTION

Jurisdiction in the United States District Court was premised on 28 U.S.C. §§ 1331, 1346, and 1361, based on causes of action arising under 15 U.S.C. § 1, 29 U.S.C. §§ 151, 186, 187(b), 5 U.S.C. § 702, 41 U.S.C. § 253 and 28 U.S.C. § 2201. Jurisdiction in the Court of Appeals was premised on 28 U.S.C. § 1291. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 152:

> "When used in this subchapter —
>
> * * *
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or an wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, . . ."

29 U.S.C. § 158:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into

heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, which ever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular

geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title."

STATEMENT OF THE CASE

This appeal challenges the decision of the United States Court of Appeals for the Sixth Circuit, which erroneously affirmed the dismissal of Petitioners' civil action. Petitioners sought to enjoin the implementation of a solicitation/bid condition or subcontract provision requiring, as a condition of receiving a Department of Energy ("DOE") construction award at DOE's Oak Ridge Operations facilities ("DOE-ORO"), that the petitioning construction companies execute and be bound by the "Project Labor Agreement" entered into by DOE's Management and Operating ("M&O") contractor, MK-Ferguson of Oak Ridge Company ("MKF") and the Knoxville Building and Construction Trades Council, AFL-CIO ("the Trades Council").

This petition seeks review of the Sixth Circuit's decision that the Project Labor Agreement and bid specifications do not constitute governmental interference with the process of private sector collective bargaining in violation of the National Labor Relations Act. As presently enforced, the Project Labor Agreement denies the petitioning contractors their right to freedom of choice in collective bargaining; forces Petitioners to abandon their right to set their own terms of employment and operate on a non-union basis; requires that Petitioners recognize the Knoxville Building and Construction Trades Council, AFL-CIO, as their exclusive bargaining representative; and coerces Petitioners to receive their skilled craftsmen through an exclusive union referral system.

A. Facts

This action was brought by persons and entities who have performed work and seek to continue to perform work on construction projects located at the DOE's ORO facility. Petitioners include a general contractor, Phoenix Engineering, Inc.; two subcontractors, Tennessee Roofing Co., Inc. and Del-Air Service Co., Inc.; two non-union skilled workmen, Lloyd J. Bunch and Jerry C. Bible; the East Tennessee Chapter of Associated Builders and Contractors, Inc. (a nonprofit corporation whose construction contractor members do not have collective bargaining relationships with any labor unions); and Associated General Contractors of Tennessee, Inc., Knoxville Branch (a Tennessee, nonprofit corporation composed of both "union" and "nonunion" contractors as well as construction industry suppliers).

Respondent United States of America, acting through its executive agency the Department of Energy, owns and operates the ORO facility. On October 1, 1990, DOE entered into a Management and Operating ("M&O") contract with MKF under which MKF manages construction and other activities for DOE at its Oak Ridge facility.

Under the M&O Contract, DOE hired MKF to be "responsible for managing the construction phase of projects at the ORO sites ensuring that the quality of work is accomplished on schedule and within costs." (M&O Contract at p. 5). For some work, MKF is to perform construction services using its own employees. (M&O Contract at pp. 6-7). For other kinds of work, such as the kind of work at issue in this action, MKF acts as a conduit or agent of DOE by managing and monitoring those who "subcontract" to provide construction work at the ORO site. In this regard, DOE requires that MKF, under the M&O contract, must, "as authorized by DOE, enter into and administer subcontracts for the performance of any part of the work, with the subcontractors paid from U.S. Government advanced funds."

(M&O Contract at p. 11). On DOE's behalf, MKF's other "Procurement/Sub-contracting" duties include the responsibilities to, among other things, (i) "[s]olicit, analyze, evaluate, and finalize subcontract construction bids and proposals," (ii) "consult with DOE when appropriate and award the subcontract," (iii) "[c]oordinate activities for the construction subcontracts and purchase orders," and (iv) "manage subcontracts, [and] monitor subcontractor performance." (M&O Contract at pp. 10-11).

Also on October 1, 1990, in alleged furtherance of its responsibilities under the M&O contract, MKF entered into a comprehensive "Project Labor Agreement" with the Knoxville Building and Construction Trades Council, AFL-CIO ("the Trades Council"), which is a representative of several construction craft unions.[1] Under this agreement, MKF and the Trades Council, with DOE's approval, agreed to establish restrictive procedures for the employment and use of construction workers at Oak Ridge. The Agreement states that "all employers of whatever tier shall sign, accept and be governed by the terms and conditions of this Project Agreement." (Project Agreement at p. 2). The Agreement further provides that the petitioning construction companies, defined therein as "employers," must recognize the respective signatory unions as exclusive bargaining representatives for their craft employees. (Project Agreement at p. 4).

Under the Agreement, the petitioning construction companies are required to notify the unions as to the number and classification of employees required to perform the construction work under their respective "subcontracts." (Project Agreement at pp. 5-6). The unions are then responsible for supplying the numbers of employees required, in accordance with the unions'

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[1] DOE documents obtained through discovery and presented to the court below established that DOE officials were actively involved in these negotiations.

respective hiring hall procedures.[2] The Project Labor Agreement further provides that each signatory union may place a working steward with each employer as a representative of the union. (Project Agreement at pp. 8-9). The employer construction companies are allowed to retain only four key employees as provided under a "Key Employee Procedure" of the Agreement. (Project Agreement at p. 46).

The effect of this scheme is that a non-union construction company will be forced to give up its right to collective bargaining and pass control of its work force to the unions when it becomes a signatory to the Project Labor Agreement. Once the non-union construction contractor has executed the Project Labor Agreement, it must fire all existing employees working on DOE-ORO projects (other than the four "key" employees), and replace these fired employees through the Union Referral System. Since the Agreement requires that a union steward be assigned to each contractor for each craft working on the project, union members necessarily will be assigned to each formerly non-union contractor.

Consistent with Department of Energy Acquisition Regulation ("DEAR") subpart 933.1, 48 C.F.R. § 933.1 (1990) (entitled "Protests"), Petitioners, through their representatives, met with officials of DOE's Oak Ridge Operations. At that meeting, Petitioners presented their claims that enforcement of the subject Project Labor Agreement and related bid specifications violated numerous federal laws and regulations. At the conclusion of that meeting, DOE rejected Petitioners' claims

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[2] This process is commonly referred to as the "Union Referral System." It gives priority to construction craft workers in accordance with five different priority lists. It also contains a provision requiring that each individual worker pay his or her pension monies into the respective union's pension plan. While individual workers are not required to be union members, the unions exercise control through the operation of this system.

and directed them, if aggrieved, to seek remedial action in the courts.

B. Procedural History

On December 3, 1990, Petitioners filed this action in federal district court seeking declaratory and injunctive relief against Respondents DOE, the Manager of DOE-ORO, MKF, and the Trades Council. On January 2, 1991, Petitioners filed a motion for preliminary injunction. Respondents opposed Petitioners' motion and DOE also moved for summary judgment. After hearing oral argument, the district court denied Petitioners' motion for a preliminary injunction by order dated March 22. The court made findings only with regard to the issues of labor law raised by the Petitioners and failed to address issues relating to alleged violations of the Competition in Contracting Act ("CICA"), 41 U.S.C. § 253. Pet. App. 50-G.

By order dated April 29, the district court decided DOE's motion for summary judgment. Although recognizing that the Project Labor Agreement "works to the financial disadvantage" of the Petitioners, the court nevertheless granted DOE's motion as to all claims, except Petitioners' CICA claim, which the court found to be Petitioners' "most persuasive contention" against both the federal defendants and MKF. Pet. App. 48-F. Despite this finding, however, the court refused to issue an injunction pending appeal on either the labor law or CICA claims, by order dated May 22. Pet. App. 41-E.

On April 24, the Trades Council moved for summary judgment as to all counts. On June 20, the district court granted the Trades Council's motion for summary judgment on all claims, including the CICA claim. The court also granted summary judgment to MKF on all counts, except the CICA claim. Pet. App. 37-D.

Finally, on October 28, immediately prior to the oral argument before the Sixth Circuit on Petitioner's appeal from the

denial of the preliminary injunction, the District Court granted final judgment to all Respondents contemporaneous with its entry of an order granting DOE's and MKF's motions to dismiss the remaining CICA claim. Pet. App. 32-C.

On April 18, Petitioners had appealed from the district court's denial of their request for preliminary injunctive relief. On November 11, Petitioners filed a notice of appeal from the district court's final summary judgment order, and moved to consolidate the appeal from the district court's denial of the preliminary injunction with the appeal from the final judgment. On December 9, this motion was granted by the Court of Appeals. On June 11, 1992, the Court of Appeals issued an opinion which affirmed the several orders of the district court denying the Petitioners any relief. Pet. App.1-A.

With regard to Petitioners' NLRA claim, the Court agreed for purposes of its decision that DOE was involved in the negotiation of the Project Labor Agreement. Pet. App. 13-A. The Court further agreed with Petitioners' contention that the Supreme Court's prohibition against governmental interference with private sector collective bargaining applied to actions of the federal government. *Id.* at 17-A. Nevertheless, the Court refused to find a violation of the NLRA in the present case, holding instead that the "Project Labor Agreement is an example of a labor practice that Congress closely regulated and *Machinists* preemption does not apply." *Id.* at 23-A. In addition, the Court claimed without supporting authority that "there is a well-recognized general principle regarding preemption, that government spending decisions pursuant to economic goals are not subject to preemption." *Id.* at 24-A. Accordingly, the Court expressly declined to adhere to the decisions of the First and Eighth Circuits which found governmental "union-only" requirements to be preempted by the NLRA. *See Associated Builders and Contractors v. Mass. Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991), *cert. granted sub nom Building and*

Construction Trades Council v. Associated Builders and Contractors, 60 U.S.L.W. 3768, 3779 (U.S. May 18, 1992) (No. 91-261, No. 91-274) ("*ABC v. MWRA*" or "*Boston Harbor*"); *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991) ("*Glenwood Bridge*").

REASONS FOR GRANTING THE WRIT

As is further shown below, the Sixth Circuit's opinion conflicts directly with this Court's precedent and decisions of other circuit courts of appeals on issues of national importance. The effect of the decision is to allow the federal government to interfere directly in the process of private sector collective bargaining. Billions of dollars of government contracts are ultimately at stake, and a review by this Court is needed to remedy a substantial transgression of national labor policy.

The Court has already granted certiorari in *ABC v. MWRA*, the First Circuit case with which the present decision squarely conflicts. Accordingly, certiorari should be granted here as well, and/or the petition should be held in abeyance for possible remand, depending on the outcome of the First Circuit appeal.

I. THE SIXTH CIRCUIT'S CONCLUSION THAT THE RESPONDENTS' LABOR PROJECT AGREEMENT DOES NOT INTERFERE WITH THE PROCESS OF COLLECTIVE BARGAINING IN THE PRIVATE SECTOR IS IN SHARP CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON AN ISSUE OF NATIONAL IMPORTANCE TO FEDERAL LABOR LAW.

This case involves an attempt by a federal government agency to force private, non-union contractors to enter into binding labor agreements with particular labor unions as a precondition to obtaining work on a public construction project. Numerous decisions of this Court and other courts of appeals

have held that such a requirement unlawfully intrudes into areas of labor law, namely the collective bargaining process, which Congress has determined should be left free from governmental interference under the NLRA.

As detailed below, the First and Eighth Circuits have, under virtually identical facts, reached a conclusion opposite to the Sixth Circuit's holding in this case, expressly relying upon this Court's decisions in this area. *ABC v. MWRA*, 935 F.2d at 345; *Glenwood Bridge*, 940 F.2d at 367.

The Ninth Circuit has attempted to distinguish the *Boston Harbor* and *Glenwood Bridge* decisions but has achieved a conflicting result. *Associated Builders and Contractors, Inc. v. City of Seward*, 966 F.2d 492 (9th Cir. 1992) *petition for cert. filed*, 61 U.S.L.W. ___ (No. 92-709). The federal courts simply do not agree on whether this type of government intrusion into the area of labor relations is permitted under this Court's precedents. The significant uncertainty which now pervades this area of the law underscores the need for this Court's guidance.[3]

This Court has held that governmental entities are prohibited from regulating activities which Congress has intended to be left unrestricted by any governmental power. *Lodge 76, Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm.*, 427 U.S. 132, 140 (1976). This type of federal preemption, announced in *Machinists*, was relied upon and expanded in the *Golden State* cases. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

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[3] As noted above, the Court has already granted certiorari in the *Boston Harbor* case, *see Building and Construction Trades Council v. Associated Builders and Contractors*, 60 U.S.L.W. 3768, 3779 (U.S. May 18, 1992) (No. 91-261, No. 91-274), thereby confirming the importance of the issue presented.

In *Golden State I*, the employer sought renewal of a taxicab operating license from the City of Los Angeles. At the time the employer was engaged in a labor dispute with the union that represented its employees. The City Council conditioned renewal of the franchise on settlement of the labor dispute by a specific date. When the strike was not settled by that date, the franchise expired. This Court ruled that the city's action in conditioning renewal of the franchise on settlement of the labor dispute was preempted by the NLRA. The Court held that the city's actions constituted an attempt to regulate the collective bargaining process, which Congress intended to be left unregulated by any governmental party. Thus, in *Golden State I*, this Court squarely held:

> Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA. . . . Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. . . . A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."
>
> 475 U.S. at 619 (citations omitted).

In *Golden State II*, which upheld the award of compensatory damages under the NLRA and 42 U.S.C. § 1983, the Court made even more explicit its ruling prohibiting governmental interference in the process of private sector collective bargaining. The Court stated:

> . . . Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. "[T]he

> Congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." The *Machinists* rule creates a free zone from which all regulation "whether federal or state" . . . is excluded.

493 U.S. at 111. (citations omitted).

Finally, so that there could be no doubt as to the protection of private sector collective bargaining rights from governmental interference, the Court added:

> The *Machinists* Rule is . . . akin to a rule that denies either sovereign the authority to abridge a personal liberty . . . [T]he interest in being free of government regulation of "the peaceful methods of putting economic pressure on one another" . . . is a right specifically conferred on employers and employees by the NLRA.

Id. at 112. The Court concluded that the *Machinists* preemption rule "is a guarantee of freedom for private conduct that the state may not abridge." *Id.*

In the present case, contrary to the Sixth Circuit's view, the government's intrusion into the process of collective bargaining is as direct and unlawful as the actions which were found to be prohibited in the *Golden State* cases. The DOE has sanctioned a project labor agreement pursuant to which contractors are being denied the right to perform work on government construction projects if such employers fail to subject themselves to a union contract, the terms of which are dictated by the project agreement itself. Such governmental intrusion into the process of private collective bargaining is prohibited by federal law and should have been enjoined by the Court of Appeals.

This result is bolstered by the decision of the First Circuit Court of Appeals, sitting *en banc*, in *ABC v. MWRA*, 935 F.2d

at 345. In that case, the Court of Appeals applied the *Golden State* doctrine to a governmentally enforced project labor agreement similar in all material respects to the signatory requirement at issue in the present case. There, a private construction manager hired by a governmental authority, the MWRA, negotiated a "union only" project labor agreement on the government's behalf. The effect of the government's project bid specifications enforcing the "union only" agreement was to restrict access to work on the government's construction project solely to those contractors who agreed to be bound by union contracts with a particular union.

The First Circuit properly found this type of governmental interference with the collective bargaining process to be squarely prohibited by the NLRA. As the court unequivocally held, the imposition of a "union only" project labor agreement as a condition for the performance of government work constitutes "pervasive" intrusion into the bargaining process: "The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes the state here *eliminates* the bargaining process altogether." 935 F.2d at 353. Finding *Golden State* to be directly applicable, the court enjoined enforcement of the project labor agreement as a condition for the award of work on the government-funded construction project. *Id.* at 360.[4]

The Sixth Circuit acknowledged that the *Boston Harbor* case presented "exactly the factual scenario, on a state level," as this case presents on a federal level. Pet. App. at 18-A. However, the court explicitly rejected the reasoning of *Boston Harbor* and adopted the rationale of the dissenting opinion. *Id.* at

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[4] The Eighth Circuit reached the same result, relying in part on *Boston Harbor*, in *Glenwood Bridge*, 940 F. 2d at 367. *But see Associated Builders and Contractors, Inc. v. City of Seward*, 966 F.2d 492 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W.___(No. 92-709).

21-A. In support of its rejection of the First Circuit's decision, the Court accepted the proposition, relied on by the district court, that "if private contractors can enter pre-hire agreements, then so can the federal government." *Id.* This conclusion, in turn, was based upon the fact that construction industry pre-hire agreements have been "regulated" by Congress in Sections 8(e) and 8(f) of the NLRA. *Id.* at 23-A. As such, the Court reasoned, this is not an area which Congress intended to be free from regulation and preemption does not apply.

Contrary to the Sixth Circuit's view, the fact that a private construction employer might arguably be entitled to require union-only subcontracting pursuant to an agreement with its own employees is entirely irrelevant. In the first place, in describing how Congress has delineated the elements of the construction industry exception, the Court omitted the fact that the statute expressly authorizes the use of such agreements only by construction industry "employers," the meaning of which specifically excludes "the United States . . . or any State or political subdivision thereof . . ." 29 U.S.C. § 152(2). As the First Circuit said in rejecting the argument now expressed by the Sixth Circuit, "Congress is perfectly capable of distinguishing between states and private parties" as it has done in this context. 935 F.2d at 358. *See also Glenwood Bridge, supra*, 940 F.2d at 371 (holding that Sections 8(e) and (f) of the NLRA do not grant public employers the ability to enter into pre-hire agreements).

Moreover, in *Wisconsin Dept. of Ind. v. Gould, Inc.*, 475 U.S. 282, 290 (1986), this Court itself underscored the importance of the state/private distinction:

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference.

> The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

See also Golden State I, 475 U.S. at 614 ("The NLRA . . . has long been understood to protect a range of conduct against state but not private interference."). Thus, the *Boston Harbor* court rightly concluded that "it is plain that the private employer comparison merits little weight. The MWRA [like the DOE] is an arm of the state, and its acts must be judged accordingly." 935 F.2d at 358.[5]

The Sixth Circuit also sought to distinguish *Golden State* and *Gould* on the basis that "governmental spending decisions pursuant to economic goals are not subject to preemption." Pet. App. at 24-A. As such, the Court reasoned, "the DOE . . . was acting as a purchaser in the market place, not as a regulator." *Id.* This distinction, however, completely misconstrues the bases of these decisions, which rest upon whether interference in the collective bargaining process by the state is "direct," rather than on the motivation for the interference. As the First Circuit recognized: "where interference into the collective bargaining process by the state is *direct*," rather than "peripheral" to federal labor policy, no "asserted state interest . . . whether 'proprietary' or otherwise," can justify the interference. 935 F.2d at 359. Likewise, in *Golden State I*, once the Court had determined that direct governmental interference with the collective bargaining process had occurred, it explicitly found that the state's motives for bringing about the interference were irrelevant. 475 U.S. at 617-18 n.8 (rejecting argument that City was acting to protect its public transportation needs).

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[5] As the First Circuit also correctly noted, the entire Bill of Rights and many federal statutes impose restrictions exclusively on governmental, as opposed to private, actors. 935 F.2d at 358 n. 26.

Finally, the Sixth Circuit's opinion has utterly misread this Court's decision in *Gould*, transforming a case which rejected the regulatory/market participant distinction into an opinion which would somehow broadly exempt state action from NLRA preemption. In *Gould*, the Court struck down a state statute barring repeat violators of the NLRA from bidding on state contracts as preempted under the *Garmon* preemption doctrine. 475 U.S. at 291. The state argued that it should not be restricted by labor law preemption when it acts as a market participant. The Court rejected this argument, holding: "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289.

Although the *Gould* court recognized a limited exemption for state purchasing decisions which affect only conduct of "peripheral concern" to the NLRA, this Court has repeatedly held that the collective bargaining process itself can never be considered to be "peripheral" to the Act. Rather, the process of collective bargaining is the "cornerstone" of the NLRA. *See Golden State I*, 475 U.S. at 619. For this reason, this Court has *never* permitted a government agency to coerce a private employer into adopting a union agreement. *See H.K. Porter v. NLRB*, 397 U.S. 99 (1970).

Thus, the First Circuit court correctly stated that "[o]ur reading of the *Gould* 'exception' is that it largely restates the *Garmon* proposition: Some state interference into the collective bargaining process is permitted if it, first, is 'peripheral' to federal labor policy, or, second, pertains to matters 'deeply rooted in local feeling and responsibility.'" *ABC v. MWRA*, 935 F.2d at 359 (citations omitted). However, as stated above, the project labor agreement at issue here is a direct regulation of the collective bargaining process and thus cannot be termed either "peripheral" or "local." The project may indeed be of great local

interest, but that is not being regulated — "collective bargaining is being regulated, and that cannot be." *Id.* Moreover, the fact that the federal government here has acted through its bidding regulations rather than its general law is irrelevant, as "judicial concern has necessarily focused on the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted." *Golden State I*, 475 U.S. at 614 n.5.

Finally, the Sixth Circuit is simply wrong to suggest that Congressional passage of Sections 8(e) and 8(f) indicated any intent to permit "regulation" of the conduct of private employers by federal agencies beyond the express terms of the Act. Pet. App. 23-A. Here, DOE has in effect supplemented the Act by imposing governmental "union-only" requirements which are nowhere authorized by 8(e) and 8(f), in exactly the manner prohibited by this Court in *Golden State I* and *Gould*. *See* 475 U.S. at 614-615; 475 U.S. at 290. There is no basis for saying that Congress' authorization of private conduct under the NLRA constitutes an invitation to the federal government to *compel* such conduct. *See also NLRB v. Iron Workers*, 434 U.S. 335, 248 n.10 (1977).

This Court has already recognized the national importance of this issue by granting certiorari in the *Boston Harbor* case. Billions of dollars of construction contracts are ultimately at stake in the present case as well. Therefore, the Court should grant the present petition or at least hold the petition in abeyance for possible remand in light of the result in the *Boston Harbor* appeal.

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted,

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Rule 29.1 Statement. None of the Petitioners has either parent or subsidiary corporations, other than wholly owned subsidiaries.

Nos. 91-5227/6358

United States Court of Appeals

FOR THE SIXTH CIRCUIT

PHOENIX ENGINEERING, INC., TENNESSEE ROOFING CORPORATION, DEL-AIR SERVICE COMPANY, INC., LLOYD J. BUNCH, J.C. BIBLE, EAST TENNESSEE CHAPTER ASSOCIATED BUILDERS AND CONTRACTORS, INC., ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE, INC., KNOXVILLE BRANCH,

Plaintiffs-Appellants,

v.

MK-FERGUSON OF OAK RIDGE COMPANY, KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, UNITED STATES OF AMERICA, JAMES D. WATKINS, JOSEPH LaGRONE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed June 11, 1992

Before: KEITH and RYAN, Circuit Judges; and TIMBERS, Senior Circuit Judge.*

RYAN, Circuit Judge. At issue in this case is the legality of a Project Labor Agreement entered into by the defendants MK-Ferguson of Oak Ridge Corporation and the Knoxville Building and Construction Trades Council. Plaintiffs appeal from an order of the district court denying their motion for a preliminary injunction and from a series of orders of the district court dismissing the plaintiffs' complaint against the defendants.

Plaintiffs raise the following issues on appeal: 1) whether the enforcement of the Project Labor Agreement constitutes governmental interference with private collective bargaining in violation of the National Labor Relations Act, 29 U.S.C. § 158; and 2)whether the enforcement of the Project Labor Agreement violates the Competition in Contracting Act, 41 U.S.C. § 253, and the related Federal Acquisition Regulation, 48 C.F.R. § 52.24405?

We conclude that the Project Labor Agreement violates neither the NLRA nor the Competition in Contracting Act. We thus affirm the district court's dismissal of the case, and consequently do not reach the plaintiff's challenge to the denial of a preliminary injunction.

I.

The case involves three groups of plaintiffs: the corporate or contractor plaintiffs are Phoenix Engineering, Inc., Tennessee Roofing Corporation, and Del-Air Service Company, Inc.; the individual plaintiffs are Lloyd Bunch and J.C. Bible; and the association plaintiffs are the East Tennessee Chapter Associated Builders and Contractors and the Associated General Contrac-

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* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

tors of Tennessee, Inc. The defendants are the general contractor MK-Ferguson of Oak Ridge Corporation, the federal defendants,[1] and the other Knoxville Building and Construction Trades Council, AFL-CIO.

The Department of Energy (DOE) maintains a nuclear facility at Oak Ridge, Tennessee, known as Oak Ridge Operations (ORO). The DOE retains outside contractors to operate and manage different aspects of the facility. Prior to 1989, construction at ORO was directed by three entities: the DOE itself, the overall facility manager (Martin Marietta), and the construction contractor (Rust Engineering). In 1989, the DOE decided to consolidate the functions of outside contractors for all construction. In April 1990, the DOE chose MK-Ferguson of Oak Ridge Corporation (MK-F) to succeed Rust Engineering. MK-F took over the operation on October 1, 1990, when the Management and Operating (M&O) contract it entered into with the DOE took effect.

In May 1990, prior to DOE's contract with MK-F taking effect, there was a labor strike at ORO when the existing Rust Labor Agreement expired. MK-F, knowing it would soon assume responsibility for construction at ORO, stepped in and negotiated with the Building Trades Council, an umbrella organization representing sixteen different craft unions. By August, MK-F and the Building Trades Council agreed on a preliminary version of the Project Labor Agreement, a type of labor agreement known as a prehire agreement. One major difference between this new agreement and the Rust Labor Agreement was that under the Rust agreement, nonunion signatory subcontractors were not required to adopt the full agreement, only the work rules. Under the new Project Labor

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[1] The federal defendants are the United States, James D. Watkins, the Secretary of Energy, and Joseph LaGrone, the Manager of the Department of Energy's Oak Ridge Operations.

Agreement, nonunion contractors had to adopt the whole agreement, including the employee referral provisions.

In August 1990, several contractors, including the plaintiffs, protested some of the provisions. In September, MK-F and the Building Trades Council modified the provisions relating to the job referral procedures, incorporating a core employee provision. The final version went into effect on October 1. Under the final version, the Project Labor Agreement requires "[a]ny subcontractor, of whatever tier, performing covered work on this project site, shall become a signatory to this Project Agreement." The Agreement also requires employers to "recognize[ ] the signatory unions as the collective bargaining agents for its employees."

The key provision of the final Agreement was the hiring hall procedure for the referral of employees. Under the Agreement, when the subcontracting construction companies need craft employees, "the Employer shall notify as to the number and classification of employees required. It shall be the responsibility of the Unions to supply the necessary numbers in accordance with hiring hall procedure." Once tradesmen are referred by the Union, the employer "shall have the right to determine the competency of all employees. . .[and also] the right to reject any applicant referred by the Unions." The employer must use the hiring hall for all employees except that "[e]ach employer will be allowed to have designated and referred for employment of up to four (4) of their supervisory, regular, essential or key employees (hereinafter known as 'core' employees)." While the referred employees themselves need not be union, the Unions will control the referral through the hiring halls.

In October 1990, MK-F solicited bids from subcontractors pursuant to the new M&O contract. At the time, MK-F utilized the Rust Subcontract Document Package, which explained various details of the relationship between prime contractor and the subcontractor. Both the bid solicitation itself and the docu-

ment package contained several provisions relating to DOE involvement. In November 1990, MK-F revised its Subcontract Document Package and deleted any references to the DOE.

In December 1990, plaintiffs filed a complaint seeking declaratory and injunctive relief against defendants. The complaint contained five counts: 1) labor law preemption claim and related constitutional claims of contractor plaintiffs;2) labor law preemption claim and related constitutional claims of individual plaintiffs; 3) Competition in Contracting Act (CICA) and Federal Acquisition Regulation (FAR) claims; 4) antitrust claims; and 5) a specific labor law claim regarding the "hot cargo" prohibition in the NLRA, 29 U.S.C. § 158(e). The complaint sought and injunction to restrain the defendants from enforcing the Project Labor Agreement, a declaration that the Agreement violates federal law, and an award of monetary damages.

In January 1991, plaintiffs moved for a preliminary injunction to prevent enforcement of the Project Labor Agreement and to prevent MK-F from letting any subcontracts pursuant to the Agreement. All defendants opposed the request and the DOE also moved to dismiss, or alternatively, for summary judgment. On March 22, 1991, the district court denied the plaintiffs' motion for a preliminary injunction. Plaintiffs filed a timely notice of appeal in April.

On April 29, the district court granted in part and denied in part the federal defendants' motion to dismiss. The district court dismissed most claims, including the NLRA claim, but refused to dismiss and denied summary judgment as to the CICA-FAR claim.

On April 24, the Building Trades Council moved for summary judgment on all counts. MK-F did the same on May 8. On June 20, the district court granted the Building Trades

Council's motion for summary judgment on all claims, including the CICA-FAR claim. The court granted summary judgment to MK-F on all but the CICA-FAR Claim.

Immediately prior to oral argument in this court in the appeal from denial of a preliminary injunction, the district court granted final judgment to the defendants contemporaneous with its entry of an order granting the remainder of the federal defendants' and MK-F's motions to dismiss. In this order, the district court discussed the remaining claim, that is, the CICA-FAR claim, against the federal defendants and MK-F.

On November 5, this court heard oral argument in the appeal of the denial of the preliminary injunction. At that time, all parties expressed a desire to consolidate the pending appeal with the upcoming appeal from the dismissal of the compliant. On November 6, plaintiffs filed a timely notice of appeal from the orders which granted final judgment to defendants. On November 11, plaintiffs filed a motion to consolidate the appeal from the district court's denial of the preliminary injunction with the appeal from the final judgment, and on December 9, this court granted the plaintiff's motion to consolidate appeals.

II.

Disposition of Underlying Case

A.

Standard of Review

The resolution of the underlying case requires us to review the district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. This court reviews a grant of a motion to dismiss under the *de novo* standard: "Whether the district court properly dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to *de novo* review. All factual allega-

tions are deemed admitted, and when an allegation is capable of more than one inference, it must be construed in the plaintiff's favor." *Sinay v. Lanson & Sessions Co.*, 948 F..2d 1037, 1039-40 (6th Cir. 1991) (citations omitted).

We note that the district court did not address the various motions exactly as presented by the parties. While the federal defendants' motions included a motion to dismiss, neither the Building Trades Council nor MK-F ever moved to dismiss, moving instead for summary judgment. Nevertheless, the district court disposed of the two contested issues—the NLRA claim and the CICA-FAR claim—under Rule 12(b)(6) as to all defendants. Therefore, this court will review the district court's various orders accordingly.[2]

B.

NLRA Claim

Although the plaintiffs originally based their complaint on several grounds, on appeal they pursue only the NLRA issue and the CICA-FAR issue. As to the NLRA issue, plaintiffs generally contend that the preemption doctrine established by the Supreme Court in *Machinists v. Wisconsin Employment*

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[2] The Building Trades Council and MK-F moved for summary judgment on all claims. The district court granted summary judgment to the Building Trades Council and MK-F on all claims against them, with the exception of the CICA-FAR claim against MK-F. Order, 6/20/91, at 4. Nevertheless, in granting summary judgment, the district court expressly noted that it was relying on its earlier order granting the federal defendants' motion to dismiss. In that order, the district court dismissed (as opposed to granting summary judgment on) all claims against the DOE, including the NLRA claim, except for the CICA-FAR claim. Order, 4/29/91, at 8. The district court later disposed of the CICA-FAR claims against the DOE and MK-F in a single order. The district court dismissed, pursuant to Fed.R.Civ.P.12(b)(6), the CICA-FAR claim of the plaintiffs. Order, 10/28/91, at 6. As to the CICA-FAR claim specifically against MK-F, the district court apparently treated MK-F's summary judgment motion as a motion to dismiss.

Relations Comm'n, 427 U.S. 132 (1976), prevents the enforcement of the Project Labor Agreement.

The NRLA issue involved two questions:

1. Whether the DOE is the real contracting party in this case?

2. Whether *Machinists* preemption operates to prohibit interference by governmental actors in the negotiation of a prehire agreement?

1.

District Court Opinions

The district court addressed the NLRA issue in three different orders. The court extensively discussed the issue in its March 22 order denying the plaintiff's motion for a preliminary injunction. The district court also considered the issue in its April 29 order dismissing the NLRA claim against the DOE, and in its June 20 order granting summary judgment to the Building Trades Council and MK-F on the NLRA claim.

The heart of the district's court's reasoning on the NLRA issue lies in its March 22 and April 29 orders.[3] Therefore,

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[3] In its April 29 order, the district court addressed the DOE's motion to dismiss all claims, including the NLRA claim. The district court granted the motion, except as to the CICA-FAR claim. In its June 20 order, the district court addressed the summary judgment motions of the Building Trades Council and MK-F. The court simply noted:

> In an order of April 29, 1991, this Court dismissed all the claims against the federal defendants except those involving [CICA and FAR].
>
> For the same reasons expressed in that Order, the Court hereby dismisses all claims against the private defendants that involve violations of the National Labor Relations Act or raise a constitutional claim.

Order, 6/20/91, at 2-3.

although we do not review the district court's decision on the preliminary injunction, as noted below in Part III of this opinion, we will analyze the reasoning contained in the March 22 order as it applies to the NLRA issue.

> In its April 29 order, the district court initially noted:
>
> For purposes of the pending motion, the Court is prepared to accept that there is an agency relationship between the government defendants and MK-F; that the government was involved, through its agent, in negotiating the Project Labor Agreement; and that one effect of the agreement is to increase the estimated cost of construction to non-union contractors who bid for government contracts, depriving them of a significant competitive edge they previously had over unionized construction contractors.

Order, 4/29/91, at 5. The court also reference its earlier findings, noting: "As indicated in this Court's Order of March 22, 1991, the Court recognizes that the Project Labor Agreement works to the financial disadvantage of the plaintiffs." *Id.* at 6.[4]

> The district court then held on the NLRA claim:
>
> The Court understands the plaintiff's contention that under federal labor law, the collective bargaining process must be free to occur without any form of governmental interference or control.

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[4] In the March 22 order, the district court explained the effect of the Project Labor Agreement on the plaintiffs. First, it concluded that "[t]here is no question that the Project Labor Agreement works to the financial disadvantage of the plaintiffs and that they will suffer some harm if its enforcement is not enjoined." Order, 3/22/91, at 4. Second, it noted that Project Labor Agreement will have "the effect of coercing all subcontractors to relinquish control over the terms of employment for their employees and forcing them to give up their right to operate as an open shop, without the benefit of collective bargaining. . ." Order, 3/22/92, at 7.

> But surely this protection does not apply when one of the parties to the bargaining process is the government itself or someone acting as its agent. The Court is satisfied that the plaintiffs have failed to state any claim against the federal defendants under federal labor law.

Id. at 6. This holding dismissing the NLRA claim reflects the reasoning the district court had earlier employed, it its March 22 order, when it denied the plaintiffs' motion for a preliminary injunction.

In the March 22 order, the district court addressed the legal implications of the NLRA claim more extensively. While the district court made two factual findings, *see supra* note 4, the court did not base its decision to deny the preliminary injunction these findings. Instead, the court identified two threshold issues of law. The first was "whether there is any law that limits the DOE, acting either directly or through a maintenance and operations contractor such as MK-F, from entering into a 'pre-hire' agreement such as the Project Agreement in this lawsuit." Order, 3/22/91, at 6. As to that question, the court held: "The Court is unaware of any reasons why the DOE may not directly, or through an agent, enter into a pre-hire construction agreement like the Project Agreement in this lawsuit as long as it would be valid if entered by private parties." *Id.* at 7.

The second issue the district court considered was "whether the *Machinists* doctrine should be extended to protect third parties like the plaintiffs in this action who will forfeit their federally protected right to resist union domination *only* if they choose to bid for a government contract." *Id.* at 6 (emphasis in original). On this issue, the district court held that it did "not see why the *Machinists* doctrine should be extended to protect third parties who are free to accept the bid conditions or look for other work. There is no inalienable right to work as a non-union contractor on publicly funded projects." *Id.* at 7.

Based on this legal analysis, the district court concluded that, as to the plaintiffs' motion for a preliminary injunction, the likelihood of success on the merits was weak. The district court relied on this reasoning when it later determined, in its orders of April 29 and June 20, that the NLRA claim did, in fact, fail on its merits.

2.

MK-F/Building Trades Council Project Labor Agreement

The Project Labor Agreement executed by MK-F and the Building Trades Council is an example of a prehire agreement. A prehire agreement sets the terms and conditions of employment for workers hired by the signatory employer without the union's majority status first having been established. The NLRA establishes a general rule against such agreements. Pursuant to the statute, the Supreme Court has held that a union and an employer "commit unfair [labor] practices when they sign a collective-bargaining agreement recognizing the unions as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *NLRB v. Iron Workers*, 434 U.S. 335, 344 (1978).

The NLRA, however, establishes a specific exception to the general rule for the construction industry. Section 8(f) of the NLRA, 29 U.S.C. § 158(f), provides, in relevant part:

> It shall not be an unfair labor practice under subsection (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or, who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members. . .because (1) the majority status of such labor organization has not been estab-

> lished under the provisions of section of this Act prior to the naming of such agreement, or (2) such membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment . . . .

The Supreme Court has interpreted section 8(f) as follows:

> [Section] 8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act.

Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1983). Thus, section 8(f) operates to validate prehire agreements in the construction industry.

The Project Labor Agreement in this case includes two provisions described by section 8(f). First, in a provision implicating section 8(f)(1), Article IV of the Project Labor Agreement establishes that MK-F will recognize the unions comprising the Building Trades Council as bargaining agents.[5] Second, in a provision implicating section 8(f)(3), Article VI of

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[5] Article IV of the Project Labor Agreement establishes the following:

> Section 1. The bargaining unit under this Agreement shall comprise all craft employees who have been referred by a signatory Union and who are employed by the Employer or who will be employed in the future under the terms of this Agreement.

the Project Labor Agreement establishes the hiring hall procedure already described.

Neither side disputes that the Project Labor Agreement would be valid if entered into by a private general contractor. Plaintiffs claim, however, that the Project Labor Agreement was, in reality, negotiated by the DOE, and that this constituted governmental interference with private collective bargaining.

3.

DOE Involvement in the Project Labor Agreement

The first question presented by the NLRA preemption issue is whether MK-F was acting as the DOE's agent when it negotiated the Agreement with the Building Trades Council. Plaintiffs argue that the extent of the DOE's involvement in negotiating the project labor agreement and its level of control over MK-F created sufficient governmental interference to implicate NLRA preemption. Defendants response that the requirement that subcontractors abide by the Project Labor Agreement it not a state-enforced bid specification but rather a subcontract condition established by the negotiations of a private construction manager.

On this question, the district court assumed that the DOE was involved in the negotiation of the Project Labor Agreement. We adopt this assumption because the nature of the action under review compels us to do so. The district court disposed of the defendants' motions as if they were motions to dismiss. When we review a district court's grant of a motion to dismiss for

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> Section 2. The Employer recognizes the signatory Unions as the collective bargaining agents for its employees in the jurisdiction of the Knoxville Building and Construction Trades Council.

Thus, under this provision, the signatory union will serve as the bargaining agent for employees of a subcontractor even in the situation where the majority status of the union has not been established.

failure to state a claim on which relief may be granted, all factual allegations are deemed admitted. Here, plaintiffs have alleged that the DOE directed the negotiation of the Project Labor Agreement.

4.

Application of NLRA Preemption to a Prehire Agreement

Having resolved the first question on the NLRA preemption issue, we shall address the second, whether the NLRA prevents a governmental actor, federal or state, from negotiating a prehire agreement. The answer to this question involves a review of recent Supreme Court case law on the issue of NLRA preemption.

Congress enacted the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, in 1935 to ensure free collective bargaining. As the Supreme Court has repeatedly held, "[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (quoting *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 551 (1979) (Powell, J., dissenting)).

The Court has interpreted the NLRA to prohibit certain types of governmental interference in the collective bargaining process. The Court has articulated two distinct NLRA-based prohibitions: *Garmon* preemption, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); and *Machinists* preemption, *see also Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). *Garmon* preemption is based predominantly on the primary jurisdiction of the National Labor Relations Board. The Court succinctly described the doctrine: "The so-called *Garmon* rule protects the primary jurisdiction of the NLRB to determine in the first

instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Inc. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985) (citation omitted). *Garmon* preemption establishes that

> States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. . . . [T]he *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably protected by the Act.

Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 286 (1986). *Garmon* preemption, however, does not apply to this case because neither side alleges that the DOE somehow infringed on the jurisdiction of the NLRB or that the DOE created a regulatory scheme governing conduct prohibited by the NLRA. Further, neither side argues that a *state* is attempting to regulate a labor practice.

Machinists preemption, however, may apply. In *Machinists*, the Court considered whether the Wisconsin Employment Relations Commission could order a union to cease a concerted practice of refusing to work overtime. The union's action was not protected by the NLRA. However, the court held that Wisconsin could not declare that the union's actions were unlawful:

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful."

Machinists, 427 U.S. at 149 (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1962)).

The Supreme Court addressed the scope of *Machinists* preemption in two recent decisions, *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), and *Golden State Transit v. City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*). Both cases considered the refusal of the Los Angeles City Council to renew a taxicab operating franchise until Golden State settled a labor dispute with the Teamsters, which represented the cab drivers. In *Golden State I*, the Court held that *Machinists* preemption

> precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated,". . . Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left "to be controlled by the free play of economic forces."

Golden State I, 475 U.S. at 614 (quoting *Metropolitan Life Ins.*, 471 U.S. at 749, and *Machinists*, 427 U.S. at 140). The *Golden State I* Court continued:

> The settlement condition imposed by the Los Angeles City Council. . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons. In this case, the District Court and the Court of Appeals found that the city had conditioned the renewal of Golden State's franchise on the company's reaching a labor agreement with the Teamsters, but held that the city's action was not pre-empted by *Machinists*. This was error as a matter of law.

Golden State I, 475 U.S. at 619. *Golden State I* did not consider whether *Machinists* preemption applied to the conduct of federal actors, in addition to the conduct of state and municipal actors.

The Court provided some guidance, however, when it returned to the issue in *Golden State II*. After *Golden State I*, the district court enjoined the city to reinstate the franchise, but held that the taxi company did not have a section 1983 action for damages because the city did not violate any rights. The Supreme Court reversed, and held that the taxicab company

> is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives its rights enforceable against governmental interference under § 1983.

Golden State II, 493 U.S. at 109. In this opinion, the Court used language, albeit in dicta, which seemed to extend *Machinists* preemption to federal action:

> In *Machinists*, we reiterated that Congress intended to give parties a collective-bargaining agreements the right to make use of economic weapons, not explicitly set for [sic] in the Act, free of governmental interference. . . . "[T]he congressional intent in enacting the comprehensive federal law of labor relations required that certain types of peaceful conduct must be free of regulation,". . . The *Machinists* rule creates a free zone from which all regulation, "*whether federal or state*,". . . is excluded.
>
> . . . .
>
> The *Machinists* rule is not designed—as is the *Garmon* rule—to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies *either sovereign* the authority to abridge a personal liberty.

Golden State II, 493 U.S. at 110-11, 112 (quoting *Machinists*, 427 U.S. at 150, 153) (emphases added). The *Golden State* cases thus seem to hold that *Machinists* preemption prevents regula-

tion, either by a state of the federal government, of aspects a labor-management relations left unregulated by the NLRA.

This case, however, presents the court with the question of whether *Machinists* preemption extends to the governmental involvement in a prehire agreement. The degree to which the situation in this case should be governed by the *Golden State* holdings is central to the resolution of this case. This case is one in which the governmental body is not directly accepting bids but rather has hired a private contractor as a construction manager.

This is exactly the factual scenario, on a state level, that the First Circuit faced in *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991) (en banc) (*ABC v. MWRA*), *cert. granted*, 60 U.S.L.W. 3768, 3779 (U.S. May 18, 1992) (No. 91-274). Because the facts of *ABC v. MWRA* are similar to the present case, an analysis of the First Circuit's decision is helpful. We note, however, that the Supreme Court's recent decision to accept certiorari lessens its persuasive force.

A state entity, the Massachusetts Water Resources Authority (MWRA), retained Kaiser Engineers, Inc, as a construction manager. Kaiser then negotiated a "Master Labor Agreement" with the Building and Construction Trades Council. The agreement recognized the Trades Council as the sole bargaining representative of all craft employees and made Trades Council's hiring halls the principal source for project labor. The MWRA approved the agreement and directed that a bid specification be added requiring all subcontractors to abide by the provisions of the agreement.

Associated Builders and Contractors (ABC) sought injunctive relief against enforcement of the bidding pursuant to the added specification. The district court denied the relief. On appeal, a panel of the First Circuit reversed and granted the injunction. The First Circuit then vacated the panel's opinion for

rehearing en banc. In a 3-2 decision en banc, the First Circuit again reversed the district court and ordered that the preliminary injunction be issued.

The court reasoned that in this context,

> the state is in its common role of a third party purchaser. If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods and services, the exception would likely swallow the rule. Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NRLA. . . .

ABC v. MWRA, 935 F.2d at 355 (footnote omitted) (emphasis in original). the court then held that the bid specification "frustrates the purpose of the Act and is, therefore, preempted." *Id.*

The dissent, authored by Chief Judge Breyer and joined by Judge Campbell, disagreed with the majority on two grounds. First, it stated that "the special construction industry exceptions in the Act itself show that Congress did not intend pre-emption." *Id.* at 361 (Breyer, C.J., dissenting). Second, the dissent argued that when the state is acting as a purchaser, and is not a regulator, its actions are not subject to *Machinists* preemption. Id. at 365.

Subsequent to the First Circuit's decision in *ABC v. MWRA*, the Eighth Circuit reached the same result in *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991). After awarding a contract to plaintiff Glenwood Bridge, Minneapolis decided that it wanted to rebid the contract. Minneapolis subsequently "entered into a project labor stabilization agreement with the Minneapolis Building and Construction

Trades Council, AFL-CIO, which provides for no strikes or lockouts. The City then incorporated this agreement into its new bidding documents." *Glenwood Bridge*, 940 F.2d at 368. The court adopted the First Circuit's approach, and held that "the City is squarely confronted with *Golden State I* and *Machinists*-preemption." *Id.* at 371. The court then granted Glenwood Bridge injunctive relief, enjoining Minneapolis from bidding the project. The court did do, however, over a vigorous dissent by Judge Heaney, who expressed his view that *ABC v. MWRA* was wrongly decided. Judge Heaney concluded that

> the city is, in reality, a buyer that competes with other private and public buyers. It is entitled to the protection of a prehire agreement for the same reason as other owners or general contractors: it wanted to preserve peaceful working conditions to get the job done on time. Congress has decided that prehire agreements make for a level playing field, and we should not interfere with the decision of the city that it is in its best interest to have such contracts.

940 F.2d at 374 (Heany, J., dissenting)

In the present case, the district court explicitly rejected the initial panel decision in *ABC v. MWRA*, a holding ultimately adopted by the First Circuit en banc:

> [T]he Court does not agree with the First Circuit's original analysis. The Court is unaware of any reason why the DOE may not directly, or through an agent, enter into a prehire construction labor agreement like the Project Agreement in this lawsuit as long as it would be valid if entered by private parties. And the Court does not see why the *Machinists* doctrine should be extended to protect third parties who are free to accept the bid conditions or look for other work. There is no inalienable right to work as a non-union contractor on publicly funded jobs.

Order, 3/22/91, at 7.[6] The district court had earlier reasoned:

> It is absolutely clear that under the *Machinists* doctrine, as explained in the *Golden State* cases, MK-F or the Council would have had a valid cause of action against the federal defendants for interference in their negotiations of the Project Labor Agreement. However, neither of these negotiating parties have brought this lawsuit. The plaintiffs here are third parties who will only be affected by it if they chose to contract with MK-F or work on DOE projects.

Id. at 6. The heart of the district court's reasoning is that if private contractors can enter prehire agreements, then so can the federal government.

After examining the statute and the relevant Supreme Court precedent, we agree with the district court and with the dissents in *ABC v. MWRA* and *Glenwood Bridge*.

We begin by noting a principle that the Supreme Court has repeatedly established, that "in any pre-emption analysis, the purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins.*, 471 U.S. at 747. Unfortunately, the legislative history makes no mention of whether the drafters intended the exception permitting prehire agreements in the construction industry to apply to governmental actors. A close analysis of the structure of the section, however, suggests that Congress meant to regulate, although not prohibit, prehire agreements.

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[6] At the time of the issuance of the district court's opinion denying the motion for a preliminary injunction, the First Circuit panel opinion, *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Authority*, No. 90-1392 (1st Cir. Oct. 24, 1990), had been vacated pending rehearing en banc. That opinion had granted the injunction against the Master Labor Agreement. The First Circuit issued its en banc opinion, reaching the same result, on May 15, 1991, approximately two months after the district court's opinion in this case.

In section 8(f) of the NLRA, Congress explicitly permitted employers and unions in the construction industry to enter into prehire agreements that would otherwise constitute unfair labor practices. Congress, however, did not leave prehire agreements unregulated. Rather, section 8(f) specifies four elements of prehire agreements that would normally cause them to constitute an unfair labor practice, and then stated that these elements, when present in an agreement in the construction industry, would not serve as basis for a finding that the agreement constituted an unfair labor practice. 29 U.S.C. § 158(f)(1)-(4).

Importantly, Congress specifically limited the scope of the construction industry exception permitting prehire agreements. Section 8(f) includes a proviso which declares that a prehire agreement "which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) . . . ." 29 U.S.C. § 158(f). This proviso permits a challenge to a union's majority status during the term of a collective bargaining agreement. The Supreme Court explained the effect of this proviso:

> The [section 8(f)] exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements. . . . The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time.
>
> The proviso expos[es] unions with prehire agreements to inquiry into their majority standing by elections under § 9(c). . . .

NLRB v Iron Workers, 434 U.S. 335, 345 (1978).

In *Golden State I*, the Court held that *Machinists* preemption precludes governmental regulation "concerning conduct

that Congress intended to be unregulated." 475 U.S. at 614. Congress did not intend that prehire agreements be unregulated by limiting their use to the construction industry, by denoting which elements that prehire agreements may contain, and by permitting representation elections during the term of the collective bargaining agreement. Thus, although construction industry prehire agreements are not *prohibited*, such agreements are still *regulated*.

Prehire agreements are easily distinguishable from the conditions imposed by the City of Los Angeles in the *Golden State* cases. In that labor dispute, the taxicab company was attempting to end the strike by relying on an unregulated weapon. "Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union." *Golden State 1*, 475 U.S. at 615. Los Angeles, by conditioning the operating franchise on the settlement of the labor dispute by a certain deadline, deprived Golden State of its use of an economic weapon. Congress had left this weapon unregulated; therefore *Machinists* preemption applied. In this case, the MK-F/Building Trades Council Project Labor Agreement is an example of a labor practice that Congress closely regulated and *Machinists* preemption does not apply.

In addition to this statutory argument, a close analysis of Supreme Court precedent reveals that the Court has been reluctant to extend NLRA preemption to actions taken by governmental bodies acting as market participants, as opposed to regulators. In *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986), the Court considered a Wisconsin statute that debarred persons who had violated the NLRA three times within a five-year period from doing business with the state. The Court held that Wisconsin's action was preempted by the NLRA, reasoning:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA.

Id. at 291. We realize that *Gould* implicated *Garmon*, and not *Machinists*, preemption. However, there is a well-recognized general principle regarding preemption, that governmental spending decisions pursuant to economic goals are not subject to preemption. Chief Judge Breyer, in dissent, noted:

> In the case before us, the record makes clear that the MWRA is participating in a market place as a general contractor, like a private buyer of services. Its role as buyer is not, in any sense, a sham designed to conceal an effort to regulate. That role is direct, normal, and necessary for *purchasing*, not *regulatory*, reasons.

ABC v. MWRA, 935 F.2d at 366 (emphasis in original). In this case, MK-F entered into the Project Labor Agreement because of a local economic need: the desire to avoid strikes by member unions of the Building Trades Council. If the DOE was acting at all, it was acting as a purchaser in the market place, not as a regulator.

We respectfully disagree with the First and Eight Circuits, and agree with the reasoning of the district court. The NLRA does not preempt the action of the DOE in negotiating the Project Labor Agreement in this case.

C.

CICA-FAR Claim

Plaintiffs argue that the Project Labor Agreement, under which MK-F requires subcontractors to agree to the employee referral procedure, violates the statutes and regulations which require competition in contracting.

Congress passed the Competition in Contracting Act of 1984, 41 U.S.C. §§ 253 *et. seq.* (CICA), to maximize competition in federal procurement. The statute provides, in relevant part:

> [A]n executive agency in conducting a procurement for property or services (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title . . . and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984 . . . .

41 U.S.C. § 253(a)(1). The relevant Federal Acquisition Regulation (FAR) provides:

> The contracting officer shall, when contracting by negotiation, insert the clause at [48 C.F.R. §] 52.244-5, Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation . . . .

48 C.F.R. § 44.204(e). 48 C.F.R. § 52.244-5 requires the contracting officer to insert the following clause in contracts with contractors:

> The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum

> practical extent consistent with the objectives and requirements of the contract.

This clause appears verbatim in the M&O contract between the DOE and MK-F. § I.67.

CICA permits interested parties to a solicitation to protest a proposed award by a federal agency. CICA establishes a system under which proposed awards may be protested to the Comptroller General, but CICA does not limit the range of remedies available to interested parties. As the relevant provision establishes:

> This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this chapter shall affect the right of any interested party to file . . . an action in a district court of the United States . . . .

31 U.S.C. § 3556. Nevertheless, CICA does define the key terms "protest" and "interested party." A "protest" is

> a written objection by an interested party to a solicitation by an [sic] Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract.

31 U.S.C. § 3551(1). An "interested party" is

> an actual or prospective bidder or offeror whose economic interest would be affected by the award of the contract or by failure to award the contract.

31 U.S.C. § 3351(2).

The district court initially denied summary judgment on the CICA-FAR claim "[b]ecause there is a genuine and material factual dispute over whether or not MK-F is an agent of the United States." Order, 6/20/91, at 3. *See also* Order, 4/29/91, at

7. Later, however, the district court reconsidered. In its order of October 28, the district court dismissed the CICA-FAR claim, pursuant to Rule 12(b)(6), against the both federal defendants and MK-F. The court made one explicit factual finding and one implicit factual finding.

The explicit factual finding related to the bidding under the present contract. The district court noted: "There is nothing in the record to suggest that any of the defendants have been precluded from bidding on any MK-F subcontracting solicitation. In fact, the record indicates that the contractor plaintiffs have all been awarded contracts." Order, 10/28/91, at 4. The implicit factual finding related to the relationship between the DOE and MK-F. The district court, without actually labeling it a finding of fact, concluded that the plaintiffs failed to show that there was an express agency relationship between the DOE and MK-F. The court held:

> The federal agency involved in this lawsuit, the DOE, is not a party to the challenged Project Labor Agreement and, according to the terms of the Construction Management Agreement between MK-F and the DOE, MK-F is not permitted to enter into subcontracts in the name of the government or to bind the government. In the absence of an express agency relationship between MK-F and the DOE, the regulations governing federal agency procurement practices do not apply to MK-F's subcontract activities.

Id. at 3 (footnote omitted). In a footnote, the district court referenced section I.87(b) of the Management Agreement between MK-F and the DOE, which reads in relevant part: "Subcontracts shall be in the name of the contractor, and shall not bind or purport to bind the Government." Thus, the district court found that the party soliciting bids was MK-F, not DOE. Even accepting the plaintiffs' allegation that the Project Labor Agreement reduces competition, we find that the district court did not

err in concluding that the plaintiffs failed to state a claim upon which relief can be granted under CICA.

We find that for the purposes of bidding on the contracts let by MK-F, pursuant to the M&O agreement, none of the plaintiffs are interested parties, because the solicitations in question are not solicitations of a federal agency. 31 U.S.C. § 3351(1). The individual and association plaintiffs are clearly not interested parties because they did not bid on any contracts. The contractor plaintiffs are not interested parties because they are merely subcontractors in relation to the M&O contract between the DOE and MK-F, and subcontractors are not interested parties.

We note that FAR provisions buttress this conclusion. The governing regulation states specifically that CICA does not apply to M&O contractors, providing, in relevant part, that "the Competition in Contracting Act of 1984 is not applicable to management and operating contractor purchases." 48 C.F.R. § 970.7103(c)(2).

We also find guidance in the recent decision of the Federal Circuit in *US West Communications Servs. v. United States*, 940 F.2d 622 (Fed. Cir. 1991). The factual setting is similar to this case. The dispute involved the procurement of a telecommunications system by Westinghouse Hanford Company, the M&O contractor for the DOE's facility in Hanford, Washington. Westinghouse awarded the contract to US West, and the losing bidder filed a protest to the General Services Administration Board of Contract Appeals (GSBCA). The GSBCA heard the protest and directed the DOE and Westinghouse to award the contract to the losing bidder. US West and Westinghouse appealed, arguing that the GSBCA had no jurisdiction to hear a protest by a potential subcontractor. The court held:

> The Competition in Contracting Act of 1984 (CICA), which gave the board bid protest authority, also does not indicate any change from the past practice that

> precluded subcontractor actions before the board. Congress instead recognized that the then-existing procedures of the board were suitable for considering federal agency procurements. Although Congress originally contemplated a broader definition of parties who could protest—"any person whose direct economic interest would be affected as contractor or *subcontractor*" (emphasis added) "the CICA, as enacted, provided for protest to a solicitation by a Federal agency" and all references that would have permitted subcontractors to protest were deleted.

US West, 940 F.2d at 628 (emphasis in original) (citations omitted). The court vacated the GSBCA's decision, holding that the GSBCA lacked jurisdiction to hear an appeal brought by a potential subcontractor. We agree with the Federal Circuit. Potential subcontractors are not interested parties for the purpose of an action under CICA.

Plaintiffs advance the theory that MK-F, as an M&O contractor, is merely an agent of the DOE. Under this view, the DOE, and not MK-F, is the real contracting party, and therefore CICA applies to solicitations under the M&O agreement. The *US West* court considered this question as well, and noted that the M&O contract between the DOE and Westinghouse specifically provided that "[s]ubcontracts shall be in the name of the Contractor, and shall not bind or purport to bind the Government." *US West*, 940 F.2d at 629. Identical language appears in the M&O agreement between the DOE and MK-F. The Federal Circuit held that the GSBCA had erred in concluding that Westinghouse was the DOE's agent. *Id.* at 629-30. We again agree, and apply the same reasoning to the present case. The district court did not err in concluding that because MK-F was not the express agent of the DOE, that plaintiffs failed to state a claim for relief under CICA.

III.

Because we affirm the final judgment of the district court dismissing the claims against the federal defendants, MK-F, and the Building Trades Council, we need not consider the denial of the plaintiffs' motion for a preliminary injunction.

IV.

The district court's orders dismissing the plaintiffs' claims against the federal defendants, MK-F, and the Building Trades Council are AFFIRMED.

We decline to consider the plaintiffs' appeal of the denial of a preliminary injunction.

Nos. 91-5227/6358

United States Court of Appeals

FOR SIXTH CIRCUIT

PHOENIX ENGINEERING, INC., ET AL.,
Plaintiffs-Appellants,

v.

MK-FERGUSON OF OAK RIDGE COMPANY, ET AL.,
Defendants-Appellees.

Filed July 27, 1992

ORDER

BEFORE: KEITH and RYAN, Circuit Judges; and TIMBERS, * Senior United States Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. William H. Timbers sitting by designation from the United States Court of Appeals for the Second Circuit.

32-C

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PHOENIX ENGINEERING, INC.;
TENNESSEE ROOFING CO., INC.;
DEL-AIR SERVICE CO., INC.;
LLOYD J. BUNCH; J. C. BIBLE;
EAST TENNESSEE CHAPTER ASSOC.
BUILDERS AND CONTRACTORS, INC.
and ASSOCIATED GENERAL
CONTRACTORS OF TENNESSEE, INC.
KNOXVILLE BRANCH

v.

MK-FERGUSON OF OAK RIDGE
COMPANY; KNOXVILLE BUILDING
AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO; UNITED
STATES OF AMERICA; JAMES D.
WATKINS, SECRETARY OF ENERGY;
and JOSEPH LaGRONE, MANAGER,
DEPARTMENT OF ENERGY OAK RIDGE
OPERATIONS

No. CIV-3-90-839

Filed October 28, 1991

ORDER

This is a labor case in which two contractor associations, three of their member contractors, and two individual employees attack the legality of a Project Labor Agreement entered into by

the Knoxville Building and Construction Trades Council (the Council) and MK-Ferguson of Oak Ridge Company (MK-F), the Department of Energy's management and operating contractor at its Oak Ridge Operations. What concerns the plaintiffs is that, as a condition of receiving a DOE construction contract award, each contractor-employer must agree to be governed by the Project Labor Agreement; must recognize the signatory unions as collective bargaining agents for their employees; and must relinquish its freedom to operate without unionization. The over-all effect of the Project Labor Agreement, according to the plaintiffs, is that it increases the estimated costs of construction to non-union contractors, depriving them of a significant competitive edge over unionized construction contractors, and that it reduces the actual amount of competition between bidders for government contracts.

In a series of previous orders, the case has been limited to claims against the federal defendants and MK-F arising under the Competition in Contracts Act of 1984 (CICA) and the Federal Acquisitions Regulations (FAR). The Council has already been dismissed. The remaining defendants have now moved for reconsideration of this Court's Order of June 20, 1991, in which it declined to dismiss the CICA-FAR theory of liability. [Docs. 84 and 86].

Title 41 U.S.C. § 253 establishes the statutory competition requirements for federal procurement and requires that,

> an executive agency in conducting a procurement for property or services (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this subchapter and pursuant to Section 2752 of the Competition in Contracting Act of 1984. . .

The Competition of Contracting Act of 1984, requires that a single system of government-wide procurement regulations be

established. The Federal Acquisitions Regulations is this system.

Federal Acquisition Regulation § 52.244-5 (April 1984) provides that:

> The contractor shall select subcontracts (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.

In moving to dismiss the plaintiff's claims under CICA-FAR, the defendants make a series of arguments.

First, they contend that the "full and open competition" safeguarded by CICA was not intended to restrict the right of government agencies to determine the conditions under which they elect to enter contracts " rather its purpose was to protect the procedures used in awarding contracts. In other words the CICA-FAR provisions are simply not available to challenge the Project Labor Agreement.

They also point out that these regulations apply only to federal agency procurement practices and not to the practices of private companies acting as Department of Energy M&O contractors. The federal agency involved in this lawsuit, the DOE, is not a party to the challenged Project Labor Agreement and, according to the terms of the Construction Management Agreement between MK-F and the DOE, MK-F is not permitted to enter into subcontracts in the name of the government or to bind the government.[1] In the absence of an express agency relationship between MK-F and the DOE, the regulations governing federal agency procurement practices do not apply to MK-F's subcontract activities.

According to the defendants, a CICA claim must take the form of a "protest," which is defined as a

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[1] Management Agreement at 159, § I.87(b).

> written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract. 31 U.S.C. § 3551(1).

Procurement complaints qualify as "protests" only if the complaints are about specific solicitations or awards made by *federal agencies*. There is nothing in the record to suggest that any of the defendants have been precluded from bidding on any MK-F subcontracting solicitations. In fact, the record indicates that the contractor plaintiffs have all been awarded contracts.

In addition, the defendants point out that the CICA protest system is contract-specific and is activated by the award or proposed award of a specific contract. Generalized allegations regarding competition at DOE's Oak Ridge Operations and the potential effect of the Project Labor Agreement on future contracts simply do not state a claim under this statute.

Finally, the defendants argue that, even if the CICA-FAR were available as a mechanism to challenge the Project Labor Agreement, the plaintiffs in this action lack standing to bring suit under CICA by its own terms. The individual plaintiffs and the trade associations are not even potential bidders on specific contracts. And, while the subcontractor plaintiffs are currently engaged in contracts with MK-F, and while arguably their complaint could be construed to arise under these subcontracts, subcontractors may not sue the government under CICA unless the prime contractor "sponsors" their claim. *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984).

Both MK-F and the federal defendants call this Court's attention to the recent decision in *US West Communications Services, Inc. v. United States, Westinghouse Hanford Company etc.*, 940 F.2d 622 (Fed. Cir. 1991). This case states very clearly

that, in the absence of an express agreement to the contrary, M&O contractors such as MK-F are not agents of the government for purposes of contract protests under the CICA and that subcontractors such as the contractor plaintiffs lack standing to sue under CICA and its regulations.

The plaintiffs contend that Congressional policy is that federal procurement take place in a manner that maximizes competition and thus maximizes the potential for all citizens to take part in selling services to the government. They contend that DOE has developed an elaborate scheme to avoid compliance with this statute. DOE places its purchasing activities in the hands of "private parties" (its M&O contractors) over whom it maintains absolute control, and then proclaims, by its regulations, that the "private purchasing agent" is not its agent and is not subject to the federal procurement laws. This, according to the plaintiffs is a calculated attempt by a federal agency to ignore the clear expression of congressional policy. While the plaintiffs implicitly concede that they are not "interested parties" with standing to bring a CICA claim within the meaning of procurement law concerning bid protests, they argue that they are, nonetheless, within the zone of interest Congress intended to protect in enacting the CICA. Therefore, they enjoy an implied right of action to compel agency adherence to Congress's mandate of "full and open competition."

While this is a very attractive argument, the Court must agree with the defendants that the plaintiffs lack standing to sue under their CICA-FAR theory of recovery. Accordingly, this final cause of action is also DISMISSED, Rule 12 (b) (6), Federal Rules of Civil Procedure, and this case is CLOSED.

ENTER:

THOMAS G. HULL
United States District Judge

37-D

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

PHOENIX ENGINEERING, INC.;
TENNESSEE ROOFING CO., INC.;
DEL-AIR SERVICE CO., INC.;
LLOYD J. BUNCH; J. C. BIBLE;
EAST TENNESSEE CHAPTER ASSOC.
BUILDERS AND CONTRACTORS, INC.
and ASSOCIATED GENERAL
CONTRACTORS OF TENNESSEE, INC.
KNOXVILLE BRANCH

v.

MK-FERGUSON OF OAK RIDGE
COMPANY; KNOXVILLE BUILDING
AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO; UNITED
STATES OF AMERICA; JAMES D.
WATKINS, SECRETARY OF ENERGY;
and JOSEPH LaGRONE, MANAGER,
DEPARTMENT OF ENERGY OAK RIDGE
OPERATIONS

No. CIV-3-90-839

Filed June 20, 1991

ORDER

This is a labor case in which two contractor associations, three of their member contractors, and two individual employees attack the legality of a Project Labor Agreement entered into by

the Knoxville Building and Construction Trades Council (the Council) and MK-Ferguson of Oak Ridge Company (MK-F), the Department of Energy's construction manager at its Oak Ridge Operations. The plaintiffs claim that the Agreement violates their rights to bargain freely with their employees guaranteed under the National Labor Relations Act, 29 U.S.C. § 158(d); that it infringes on their First and Fifth Amendment rights of liberty and free association to engage in competitive entrepreneurial enterprise free from anti-competitive restraint; that it violates the individual plaintiffs' rights under Section 7 of the National Labor Relations Act and their First Amendment associational rights; that it deprives the individual plaintiffs of property in violation of the Fifth Amendment to the Constitution; that it violates 41 U.S.C. § 253 (establishing the competition requirements for federal procurement) and Federal Acquisitions Regulation § 52.244-5; and that it violates the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*.

There appears to be no dispute that the Project Labor Agreement is a valid collective bargaining agreement under Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(e), (f) (or that it would be valid if entered into by private parties). There is no question that it also has the effect of forcing nonunion businesses to recognize labor unions in order to participate in federal construction work at Oak Ridge. The plaintiffs have offered testimony, in the form of affidavits, that compliance with the agreement will likely decrease their efficiency and increase their costs, making it harder for them to bid competitively on Department of Energy jobs. They offer no concrete evidence of what the cost difference would be for any particular project.

In an Order of April 29, 1991, this Court dismissed all the claims against the federal defendants except those involving the Competition in Contracts Act of 1984 and the Federal Acquisitions Regulations.

For the same reasons expressed in that Order, the Court hereby DISMISSES all claims against the private defendants that involve violations of the National Labor Relations Act or that raise a constitutional claim. The Court also dismisses any claim against the Council, a purely private party, for violations of the Competition in Contracts Act of 1984 and the Federal Acquisitions Regulations. Because there is a genuine and material factual dispute over whether or not MK-F is an agent of the United States, the Court cannot dismiss these latter claims against MK-F in summary fashion.

The real question which must be decided at this juncture is whether or not the plaintiffs have stated a claim under the Sherman Antitrust Act against the Council or MK-F. The plaintiffs are alleging a conspiracy between MK-F and the Council to restrain competition by excluding non-union competitors and by, in effect, requiring all contractors to become union contractors. While the plaintiffs concede that, normally, a valid subcontracting clause contained in a collective bargaining agreement cannot serve as the basis of an antitrust claim, they argue that, pursuant to *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Sun-Land Nurseries v. Southern California District Council of Laborers*, 793 F.2d 1110 (9th Cir. 1986), *cert. denied* 479 U.S. 1090 (1987), a union that is otherwise guilty of conspiracy in violation of the antitrust laws cannot escape liability merely because some of the means of accomplishing the goals of that conspiracy are embodied in a collective bargaining agreement. While this may be so, the plaintiffs in this case have no evidence that the defendants are "otherwise guilty" of a conspiracy to restrain trade and they can point to nothing other than the agreement itself as evidence of an antitrust violation. Their affidavits consist of nothing more than general statements of how their bidding costs will of necessity increase because of the loss of control over their loyal, multi-skilled, flexible, nonunion labor forces. There is no indication that they have bid on or been excluded from any work

at the Oak Ridge site. The Court is satisfied that the agreement in question is exempt from the effect of the antitrust laws and that the plaintiffs have failed to state a claim under the Sherman Antitrust Act.

Accordingly, the Council's motion for summary judgement [Doc. 67] is hereby GRANTED and it is DISMISSED as a party to this case.

MK-F's motion [Doc. 72] is GRANTED IN PART. All claim against this defendant are DISMISSED except those arising under the Competition in Contracts Act of 1984 and the Federal Acquisitions Regulations.

ENTER:

THOMAS G. HULL
United States District Judge

41-E

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

PHOENIX ENGINEERING, INC.;
TENNESSEE ROOFING CO., INC.;
DEL-AIR SERVICE CO., INC.;
LLOYD J. BUNCH; J. C. BIBLE;
EAST TENNESSEE CHAPTER ASSOC.
BUILDERS AND CONTRACTORS, INC.
and ASSOCIATED GENERAL
CONTRACTORS OF TENNESSEE, INC.
KNOXVILLE BRANCH

v.

MK-FERGUSON OF OAK RIDGE
COMPANY; KNOXVILLE BUILDING
AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO; UNITED
STATES OF AMERICA; JAMES D.
WATKINS, SECRETARY OF ENERGY;
and JOSEPH LaGRONE, MANAGER,
DEPARTMENT OF ENERGY OAK RIDGE
OPERATIONS

No. CIV-3-90-839

Filed May 22, 1991

ORDER

This is a civil action for declatory and injunctive relief brought by contractors, individual workers, and non-profit construction industry organizations. Plaintiffs seek t enjoin the

defendants from forcing them to comply with the provision of a Project Labor Agreement executed between the defendants MK-Ferguson of Oak Ridge Company and the Knoxville Building and Construction Trades Council, AFL-CIO. In an Order of March 22, 1991, this Court denied the plaintiff's motion for preliminary injunctive relief. The plaintiffs have appealed from this ruling and now move the Court for an injunction (the same one originally denied) during the pendency of their appeal. [Doc. 70].

In support of this motion, the plaintiffs refer the court to some other cases where courts have granted injunctive relief pending appeal from their own denials of preliminary injunctions. They also advise the Court that the First Circuit Court of Appeals has now issued its *en banc* decision in the very similar case of *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. The Massachusetts Water Resources Authority, et al.*, and that, by a 3-2 vote, it has reaffirmed its prior holding that the governmental enforcement of a project labor agreement violates the rights of private employers to be free from governmental interference with collective bargaining.

In opposing the plaintiffs' motion, the defendants point out that nothing has changed since the Court's Order of March 22, 1991. If the Court did not find substantial grounds for issuing injunctive relief then, there is no new basis on which such relief could now be granted.

The Court agrees. Accordingly, the plaintiffs' motion for an injunction pending their appeal is hereby DENIED.

ENTER:

THOMAS G. HULL
United States District Judge

43-F

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

PHOENIX ENGINEERING, INC.;
TENNESSEE ROOFING CO., INC.;
DEL-AIR SERVICE CO., INC.;
LLOYD J. BUNCH; J. C. BIBLE;
EAST TENNESSEE CHAPTER ASSOC.
BUILDERS AND CONTRACTORS, INC.
and ASSOCIATED GENERAL
CONTRACTORS OF TENNESSEE, INC.
KNOXVILLE BRANCH

v.

MK-FERGUSON OF OAK RIDGE
COMPANY; KNOXVILLE BUILDING
AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO; UNITED
STATES OF AMERICA; JAMES D.
WATKINS, SECRETARY OF ENERGY;
and JOSEPH LaGRONE, MANAGER,
DEPARTMENT OF ENERGY OAK RIDGE
OPERATIONS

No. CIV-3-90-839

Filed April 29, 1991

ORDER

This is a civil action brought by a construction general contractor (Phoenix Engineering, Inc.), two subcontractors (Tennessee Roofing Co., Inc. and Del-Air Service Co., Inc.) two

individual, non-union skilled workmen (Lloyd J. Bunch and J.C. Bible), The East Tennessee Chapter, Associated Builders and Contractors, Inc. (a nonprofit corporation whose construction contractor members do not have collective bargaining relationships with any labor unions) and Associated General Contractors of Tennessee, Inc., Knoxville Branch (a Tennessee, non-profit corporation composed of both "union" and "non-union" contractors as well as construction industry suppliers). All of the construction companies and individual plaintiffs perform most or virtually all of their work on construction projects owned by the federal government and located at the Department of Energy's Oak Ridge Operations facilities. The plaintiffs seek declaratory and injunctive relief and damages against the Department of Energy's construction manager, M-K Ferguson of Oak Ridge Company (MK-F), and the Knoxville Building and Construction Trades Council, AFL-CIO (the Council). They seek declaratory and injunctive relief (but not money damages) against the United States of America for the actions of its executive agency, the Department of Energy Oak Ridge Operations (DOE), James D. Watkins, Secretary of Energy, and Joseph LaGrone, Manager of DOE's Oak Ridge operations. The case is now before the Court on the federal defendants' motion to dismiss, Rule 12 (b) (6), or for summary judgment, Rule 56 (b), Federal Rules of Civil Procedure. [Doc. 27].

In this lawsuit, the plaintiffs claim that MK-F, acting as an agent of DOE and as construction manager for its Oak Ridge operations, has entered into a Project Labor Agreement with the Council which violates the plaintiff contractors' rights to bargain freely with their employees guaranteed under the National Labor Relations Act, 29 U.S.C. § 158(d); which infringes on their First and Fifth Amendment rights of liberty and free association to engage in competitive entrepreneurial enterprise free from anti-competitive restraint; which violates the individual plaintiffs' rights under Section 7 of the National Labor

Relations Act and their First Amendment associational rights; which deprives the individual plaintiffs of property in violation of the Fifth Amendment to the Constitution; which violates 41 U.S.C. § 253 (establishing the competition requirements for federal procurement) and Federal Acquisitions Regulations 52.244-5; which violates the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*: and which constitutes the enforcement of an unlawful hot cargo agreement in violation of 29 U.S.C. § 158(e).

What concerns the plaintiffs is that, as a condition of receiving a DOE construction contract award, "all employers of whatever tier shall sign, accept, and be governed by the terms and conditions of this Project Agreement." The agreement provides that each employer must recognize the respective "signatory unions" as exclusive bargaining representatives for its craft employees; that each employer must notify the unions as to the number and classification of employees required and allow the union to supply the necessary numbers of employees in accordance with hiring hall procedures established under the agreement; that all craft employees must be referred through the union hiring halls except for four "key employees"; and that each craft signatory to the agreement will place a working steward with each employer as a representative of the union. This agreement mandates recognition of unions as bargaining agents; has the effect of coercing all subcontractors to relinquish all control over the terms of employment for their employees; and forces them to give up their right to operate as an "open shop." It also means they are forced to pay employees' fringe benefits to the unions. They contend that by coercing them into signing this agreement in order to receive a government construction contract, the defendants have virtually eliminated their freedom in the collective bargaining process and, more particularly, their freedom to operate without unionization.

The plaintiff contractors claim they have long-term, highly skilled, loyal employees who have been working on government

contracts at Oak Ridge for years, who will necessarily be displaced by union referrals with no special loyalty to them. This will decrease their efficiency and increase costs, making it harder for them to bid competitively on the jobs. They point out that their current (nonunion) employees are able to "cross-craft" and switch from one kind of work to another as a project progresses, maintaining continuous employment. Under the labor agreement, there would be no ability to cross-craft and workers would be laid off as soon as their part of a project was finished. They would then have to go back to the union hall, go to the bottom of the hiring list, and wait until another job was available.

In moving to dismiss, the federal defendants contend that they are not parties to the Project Labor Agreement; that MK-F is not their agent; that the United States is not subject to the National Labor Relations Act, 29 U.S.C. § 152 *et seq.*; that even if it were, the Project Labor Agreement is a valid agreement under the NRLA pursuant to 29 U.S.C. §§ 158(e) and 158(f); that the plaintiffs lack standing to sue under the Competition in Contracting Act of 1984; that even if they could sue under it, their suit would have to be brought pursuant to the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*; and that no agency of the federal government is subject to suit under the Sherman Antitrust Act.

The plaintiffs recognize that the government defendants are not actual parties to the Project Labor Agreement but contend that MK-F acted as their agent in entering the Agreement. They offer significant evidence of the agency relationship based on provisions of the Management Agreement between the government and MK-F. They also offer clear evidence of the government's monitoring and directing MK-F's negotiations with the Council over the terms of the Project Labor Agreement. For purposes of the pending motion, the Court is prepared to accept that there is an agency relationship between the govern-

ment defendants and MK-F; that the government was involved, through its agent, in negotiating the Project Labor Agreement; and that one effect of the agreement is to increase the estimated costs of construction to non-union contractors who bid for government contracts, depriving them of a significant competitive edge they previously had over unionized construction contractors. Presumably the government defendants consciously traded the advantage of having a wide cost spread between bidders for government contracts for a mechanism they hoped would reduce labor unrest (and *those* related costs).

The real question before the Court is whether or not the government was free to do so. As indicated in this Court's Order of March 22, 1991, the Court recognizes that the Project Labor Agreement works to the financial disadvantage of the plaintiffs. Nevertheless, the contract appears to be lawful if entered by private parties and the Court does not believe the fact that one party is a government agent somehow makes the contract unlawful. The Court understands the plaintiff's contention that under federal labor law, the collective bargaining process must be free to occur without any form of governmental interference or control. But surely this protection does not apply when one of the parties to the bargaining process is the government itself or someone acting as its agent. The Court is satisfied that the plaintiffs have failed to state any claim against the federal defendants under federal labor law. In addition, the Court does not believe the plaintiffs have been deprived of a First Amendment associational right just because they must operate through a union hiring hall, etc. if they choose to bid for a DOE contract at Oak Ridge. In addition, the court does not see any due process violation or Fifth Amendment claim in this case just because, if the plaintiffs sign the Project Agreement, their employee fringe benefits must be paid to the unions. Finally, the Court agrees with the federal defendants that they are not subject to the Sherman Antitrust Act.

In the opinion of the Court, the plaintiff's most persuasive contention against the federal defendants is that they have violated the Competition in Contracting Act of 1984, or relevant federal acquisitions regulations, by playing their role in negotiating an agreement which actually lessens the amount of competition between bidders and increases costs to them. The plaintiffs contend that the referral provisions of the agreement promote waste, ineffiency, and severe reductions in productivity; that they increased costs; and that they reduce competition between bidders. Title 41 U.S.C. § 253 establishes the statutory competition requirements for federal procurement and requires that

> an executive agency in conducting a procurement for property or services (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this subchapter and pursuant to Section 2752 of the Competition in Contracting Act of 1984. . .

The Competition in Contract Act of 1984, requires that a single set of government-wide procurement regulations be established.The Federal Acquisitions Regulations is the system.

Federal Acquisition Regulation § 52.244.5 (April 1984) provides that:

> The contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives of the contract.

The Court is convinced that due to the factual dispute over the question of agency and the factual dispute over whether or not the Project Labor Agreement has an anticompetitive effect on defense contracting at Oak Ridge which would violate federal procurement law, this last claim is not susceptible to summary disposition.

Accordingly, the federal defendants' motion to dismiss is GRANTED in PART. All claims against the federal defendants except the plaintiffs' claims under 41 U.S.C. § 253 and the Federal Acquisitions Regulations are hereby DISMISSED.

ENTER:

THOMAS G. HULL
United States District Judge

50-G

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

PHOENIX ENGINEERING, INC.;
TENNESSEE ROOFING CO., INC.;
DEL-AIR SERVICE CO., INC.;
LLOYD J. BUNCH; J. C. BIBLE;
EAST TENNESSEE CHAPTER ASSOC.
BUILDERS AND CONTRACTORS, INC.
and ASSOCIATED GENERAL
CONTRACTORS OF TENNESSEE, INC.
KNOXVILLE BRANCH

v.

MK-FERGUSON OF OAK RIDGE
COMPANY; KNOXVILLE BUILDING
AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO; UNITED
STATES OF AMERICA; JAMES D.
WATKINS, SECRETARY OF ENERGY;
and JOSEPH LaGRONE, MANAGER,
DEPARTMENT OF ENERGY OAK RIDGE
OPERATIONS

No. CIV-3-90-839

Filed March 22, 1991

ORDER

This is a civil action brought by a construction general contractor (Phoenix Engineering, Inc.), two subcontractors (Tennessee Roofing Co., Inc. and Del-Air Service Co., Inc.),

two individual, non-union skilled workmen (Lloyd J. Bunch and J.C. Bible), The East Tennessee Chapter, Associated Builders and Contractors, Inc. (a nonprofit corporation whose construction contractor members do not have collective bargaining relationships with any labor unions) and Associated General Contractors of Tennessee, Inc., Knoxville Branch (a Tennessee, non-profit corporation composed of both "union" and "non-union" contractors as well as construction industry suppliers). All of the construction companies and individual plaintiffs perform most or virtually all of their work on construction projects owned by the federal government and located at the Department of Energy's Oak Ridge Operations facilities. The plaintiffs seek declaratory and injunctive relief and damages against the Department of Energy's construction manager, M-K Ferguson of Oak Ridge Company (MK-F), and the Knoxville Building and Construction Trades Council, AFL-CIO (the Council). They seek declaratory and injunctive relief (but not money damages) against the United States of America for the actions of its executive agency, the Department of Energy Oak Ridge Operations (DOE), James D. Watkins, Secretary of Energy, and Joseph LaGrone, Manager of DOE's Oak Ridge operations.

In this lawsuit, the plaintiffs claim that MK-F, acting as an agent of DOE and as construction manager for its Oak Ridge operations, has entered into a Project Labor Agreement with the Council which violates the plaintiff contractors' rights to bargain freely with their employees guaranteed under the National Labor Relations Act, 29 U.S.C. § 158(d); which infringes on their First and Fifth Amendment rights of liberty and free association to engage in competitive entrepreneurial enterprise free from anti-competitive restraint; which violates the individual plaintiffs' rights under Section 7 of the National Labor Relations Act and their First Amendment associational rights; which deprives the individual plaintiffs of property in violation of the Fifth Amendment to the Constitution; which violates 41

U.S.C. § 253 (establishing the competition requirements for federal procurement) and Federal Acquisitions Regulation § 52.244-5; which violates the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*; and which constitutes the enforcement of an unlawful "hot cargo" agreement in violation of 29 U.S.C. § 158(e).

What concerns the plaintiff contractors is that, as a condition of receiving a DOE construction contract award, "all employers of whatever tier shall sign, accept, and be governed by the terms and conditions of this Project Agreement." The agreement provides that each employer must recognize the respective "signatory unions" as exclusive bargaining representatives for its craft employees; that each employer must notify the unions as to the number and classification of employees required and allow the union to supply the necessary numbers of employees in accordance with hiring hall procedures established under the agreement; that all craft employees must be referred through the union hiring halls except for four "key employees"; and that each craft signatory to the agreement will place a working steward with each employer as a representative of the union. This agreement mandates recognition of unions as bargaining agents; has the effect of coercing all subcontractors to relinquish all control over the terms of employment for their employees; and forces them to give up their right to operate as an "open shop." It also means they are forced to pay employees' fringe benefits to the unions.

The plaintiff contractors claim they have long-term, highly skilled, loyal employees who have been working on government contracts at Oak Ridge for years who will necessarily be displaced by union referrals with no special loyalty to them. This will decrease their efficiency and increase costs, making it harder for them to bid competitively on the jobs. They point out that their current (nonunion) employees are able to "cross-craft" and switch from one kind of work to another as a project progresses, maintaining continuous employment. Under the

labor agreement, there would be no ability to cross-craft and workers would be laid off as soon as their part of a project was finished. They would then have to go back to the union hall, go to the bottom of the hiring list, and wait until another job was available.

The case is now before the Court on the plaintiffs' motion for a preliminary injunction. [Doc. 8] They would have this Court enjoin the defendants from implementing and/or enforcing any solicitation/bid condition or subcontract provision requiring, as a condition of receiving a DOE construction contract award, that the plaintiff construction companies must execute and be bound by the "Project Labor Agreement" entered into by MK-F and the Council. This motion came before the Court for a hearing on February 6, 1991, and has subsequently been re-briefed by the parties.

There is no question that the Project Labor Agreement works to the financial disadvantage of many of the plaintiffs and that they will suffer some harm if its enforcement is not enjoined. Nonetheless, it is also clear that the agreement would be a lawful collective bargaining agreement for the building and construction industry under the National Labor Relations Act, 29 U.S.C. § 158 (e) and (f), if it had been negotiated in the private sector. And the fact that it would have the effect of forcing nonunion business to recognize labor unions in order to participate in certain construction work would not give these businesses the right to any form of judicial relief.

What invalidates the agreement at issue in this lawsuit, according to the plaintiffs, is that it is the product of unlawful governmental interference in the collective bargaining process. They claim, in effect, that they are the intended beneficiaries of a statutory scheme that prevents governmental interference in their attempts to remain non-union. The plaintiffs argue, correctly, that under the National Labor Relations Act, all collective bargaining should be conducted in a free economic atmosphere

without governmental coercion, interference or control. This argument, based on the "*Machinists* doctrine," *see Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), was recently explained in two Supreme Court Cases, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and *Golden State Transit Corp. v. City of Los Angeles*, ___U.S.___, 110 S.Ct. 444 (1989). There is no question that these cases stand for the proposition that the collective bargaining process must be free from governmental interference or regulation.

However, the *Golden State* cases are quite different from the case at hand. In these cases, the City of Los Angeles was found to have violated the federal rights of Golden State Transit Corporation by conditioning the renewal of its taxi cab franchise agreement on the settlement of a pending labor dispute between Golden State and its union. In other words the city, as an outside, governmental third party, unduly interfered in the free give and take between the taxi cab company and its union, giving the taxi cab company a cause of action for both injunctive and monetary relief. It is absolutely clear that under the *Machinists* doctrine, as explained in the *Golden State* cases, MK-F or the Council would have had a valid cause of action against the federal defendants for interference in their negotiations of the Project Labor Agreement. However, neither of these negotiating parties have brought this lawsuit. The plaintiffs here are third-parties to the agreement who will only be affected by it if they chose to contract with MK-F for work on DOE projects.

As the Court understands this lawsuit, there are two related threshold issues which must be addressed. The first is whether there is any law that limits the DOE, acting either directly or through a maintenance and operations contractor such as MK-F, from entering into a "pre-hire" agreement such as the Project Agreement in this lawsuit. The second is whether the *Machinists* doctrine should be extended to protect third parties

like the plaintiffs in this action who will forfeit their federally protected right to resist union domination *only* if they choose to bid for a government contract.

The Court is aware of only one other case where the *Machinists* doctrine was extended to third parties in this manner, *Associated Builders and Contractors of Massachusetts/Rhode Island Inc. Massachusetts Water Resource Authority*, No. 90-1392, 1st Circuit Court of Appeals, October 24, 1990. In an opinion which has subsequently been vacated pending a hearing *en banc*, the First Circuit found that a Master Labor Agreement similar to the one at issue in this case, violated the *Machinists* doctrine by altogether eliminating the collective bargaining process. The injunction issued in that case is still in effect pending rehearing *en banc*.

Since the Project Labor Agreement in this case has the effect of coercing all subcontractors to relinquish control over the terms of employment for their employees and forcing them to give up their right to operate as an open shop, without the benefit of any collective bargaining, if the First Circuit is correct in its analysis, the plaintiffs in this case should be entitled to their injunction too.

However, the Court does not agree with the First Circuit's original analysis. The Court is unaware of any reason why the DOE may not directly, or through an agent, enter into a pre-hire construction labor agreement like the Project Agreement in this lawsuit as along as it would be valid if entered by private parties. And the Court does not see why the *Machinists* doctrine should be extended to protect third parties who are free to accept the bid condition or look for other work. There is no inalienable right to work as a non-union contractor on publicly funded projects.

In deciding whether or not to order preliminary injunctive relief, the Court must consider the plaintiffs' likelihood of success on the merits of the lawsuit; whether the injunction will

save them from irreparable harm; whether the injunction would harm others; and whether the public interest would be served by the injunction. *In re Delorean Motor Co.* 755 F.2d 1223, 1228 (6th Cir. 1985).

In this case, the Court is of the opinion that the plaintiffs' likelihood of prevailing on the merits is weak. And while it does appear that the plaintiffs may be harmed, the harm is economic and presumably may be remedied. It its by no means clear that ordering injunctive relief would seriously disrupt the government's work at Oak Ridge or that the public interest would be particularly affected. However, when these factors are weighed, the Court is of the firm opinion that preliminary injunctive relief should be, and hereby is DENIED.

ENTER:

THOMAS G. HULL
United States District Judge

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

No. 92-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHOENIX ENGINEERING, INC., *et al.*,
Petitioners,

v.

MK-FERGUSON OF OAK RIDGE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS MK-FERGUSON OF OAK RIDGE COMPANY AND KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, IN OPPOSITION

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QUESTION PRESENTED

Does the National Labor Relations Act (NLRA) preempt private construction contractors, selected by a federal agency to perform construction on a federally-owned nuclear reservation, and labor organizations representing their employees, from negotiating and implementing a bargaining agreement authorized by Section 8(e) and 8(f) of the NLRA, on the federally-funded construction project?

STATEMENT UNDER RULE 29.1

Respondent MK-Ferguson of Oak Ridge Company is a wholly owned subsidiary of the Morrison-Knudson Corporation of Boise, Idaho. Respondent Knoxville Building and Construction Trades Council, AFL-CIO, is an unincorporated labor organization headquartered in Knoxville, Tennessee. It has no parent company or subsidiary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-724

PHOENIX ENGINEERING, INC., *et al.*,
Petitioners,

v.

MK-FERGUSON OF OAK RIDGE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS MK-FERGUSON OF OAK RIDGE COMPANY AND KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, IN OPPOSITION

Respondents MK-Ferguson of Oak Ridge Company and Knoxville Building and Construction Trades Council, AFL-CIO, respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A-30-A) is reported at 966 F.2d 1513. The opinions of the district court (Pet. App. 32-C-56-G) are not reported.

STATEMENT OF JURISDICTION

The order of the court of appeals dismissing petitioners' appeals (Pet. App. 1-A-30-A) was entered June 11, 1992. The order of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. 31-B) was entered

July 27, 1992. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of Sections 2(2), 8(e) and 8(f) of the National Labor Relations Act (29 U.S.C. §§ 152(2), 158(e) and 158(f)) are reproduced at pages 2-4 of the petition.

STATEMENT OF THE CASE

The Department of Energy's Oak Ridge Operations

MK-Ferguson of Oak Ridge Company entered into a Management and Operating (M&O) contract with the Department of Energy (DOE) to manage and perform construction for DOE at its mammoth nuclear research and development facility in Oak Ridge, Tennessee (ORO), effective October 1, 1990. Although DOE exercises supervision of activities at ORO, day-to-day responsibility for the operational functions of the reservation and for the on-going construction program have been delegated to independent, private M&O contractors since the facility's establishment in the 1940s.[1]

Current construction activity at ORO involves both new construction and alteration of the buildings on three separate sites: the Weapons Production Plant, the Oak Ridge National Laboratory, and the Gaseous Diffusion Plant. The ORO construction expenditures for the years 1990 through 1997 were estimated to be between $50 and $80 million each year.

In 1989, DOE advertised for bids for consolidated construction management services at ORO. One of the elements of the DOE's Request for Proposal requested bidders to describe their intended labor relations approach. In its response, MK-Ferguson stated that it intended to

---

[1] The NLRB first asserted jurisdiction over ORO M&O contractors in 1947. *Carbide and Carbon Chemical Corp.*, 73 N.L.R.B. 134 (1947).

extend prehire recognition to the Knoxville Building and Construction Trades Council and attempt to negotiate a project labor agreement.[2]

MK-Ferguson was selected in May, 1990 and commenced negotiations for its recommended project labor agreement on or about June 29, 1990. DOE did not participate in the negotiations and did not direct the contractor's bargaining strategy.

A tentative project labor agreement was achieved on or about July 16, 1990. It entailed pre-hire recognition of the construction trades unions, a commitment to seek referrals for craft union positions under a negotiated job referral procedure, and a requirement that all contractors and subcontractors on the project must subscribe to the terms of the labor agreement. All contractors are qualified to bid on ORO construction, regardless of union affiliation, provided only that upon successful contract award, the contractor must agree to abide by the terms of the agreement for ORO work only. In addition, the proposed agreement contained a no-strike commitment, grievance and arbitration machinery, a mechanism for adjustment of wages and benefits over term and other ORO-specific working conditions. DOE is not a party to the agreement. *See*, Pet. App. 46-F.

---

[2] MK-Ferguson attached four separate project labor agreements which the Company had negotiated and applied, with significant success, on public and private sector projects throughout the United States, including the agreement MK-Ferguson had negotiated on behalf of the Saturn Corporation in Spring Hill, Tennessee and which had been expressly validated by the General Counsel of the National Labor Relations Board. *Morrison-Knudsen Co.*, 13 NLRB Advice Mem. Rptr. ¶ 23,061 (NLRB-GC 1986). Other project agreements covered construction for the U.S. Army at Ft. Drum, New York, and for DOE at nuclear facilities in Hanford, Washington, the Idaho National Engineering Laboratory, and Savannah River, South Carolina.

The proposed agreement was the same, in all material respects, as the labor agreement that had applied to construction work at ORO from 1956 to 1983.

Subsequently, after protests by several local contractors, including petitioners in this matter, MK-Ferguson and the Knoxville Building and Construction Trades Council refined the job referral procedures, including incorporation of a key employee procedure which would permit any contractor to select up to four employees without resort to the union hiring halls. Complete agreement on the project labor agreement and job referral procedures was achieved in September, 1990.

Decisions Of The Courts Below

Petitioners filed a complaint against the United States, DOE, certain DOE executives, MK-Ferguson and the Knoxville Building and Construction Trades Council to invalidate and enjoin implementation of the project labor agreement. Petitioners contended that the agreement violated the United States Constitution, the National Labor Relations Act (NLRA), the Competition in Contracting Act (CICA), the Sherman Anti-Trust Act, and the Federal Acquisition Regulations. The District Court either dismissed or granted summary judgment to all respondents on all of petitioners' claims. Pet. App. 32-C-56-G.

Petitioners appealed the dismissal of their NLRA and CICA claims. On appeal, petitioners claimed that as an M&O contractor, MK-Ferguson was an agent of DOE as a matter of law and that under this Court's decisions in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employee Relations Comm'n*, 427 U.S. 132 (1976) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989), the ORO project labor agreement was preempted by the NLRA due to the government's "interference," through its agent, with petitioners' "right" to free collective bargaining. Petitioners also claimed that by permitting MK-Ferguson to enforce the restrictive subcontracting provisions of the agreement in selection of construction subcontractors, DOE breached the "full and open" competition requirements of CICA.

The court of appeals, after *de novo* review, denied petitioners' appeal. Pet. App. 30-A. The court held that in entering into construction subcontracts and negotiating the project labor agreement, MK-Ferguson was not the express agent of the United States government and was not the government's agent as a matter of law under CICA. *Id.* at 28-A-29-A. Petitioners do not seek appeal of the CICA conclusion herein.

With respect to the NLRA issues, the court of appeals concluded that the project labor agreement was not preempted under this Court's decisions in *Machinists* and *Golden State*. In the court's view, because Congress has established a mechanism for construction industry bargaining under Sections 8(e) and 8(f), 29 U.S.C. §§ 158(e) and 158(f), and because MK-Ferguson and the Knoxville Building and Construction Trades Council had negotiated for a construction industry collective bargaining agreement in precisely the manner countenanced by Congress and authorized in the NLRA, the case does not fall within the rubric of "unregulated" activity protected by *Machinists* preemption. Pet. App. 23-A. The court found further that the First Circuit's decision in *Associated Builders and Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 356 (1st Cir. 1991), *cert. granted*, 112 S. Ct. 1935 (1992) (Nos. 91-261 and 91-274) (the *Boston Harbor* case), was not controlling in this case and that, even if it were, the *Boston Harbor* decision was not an accurate application of this Court's preemption jurisprudence. *Id.* at 24-A.

Petitioners sought rehearing and rehearing *en banc*. Not one judge on the court of appeals voted to rehear the case. Pet. App. 31-B. The petition ensued.

ARGUMENT

Because this case arises from application of a privately negotiated project labor agreement on a governmentally-funded construction project, petitioners urge that this case posits an issue similar to the one now before the Court in the *Boston Harbor* case (argued December 9, 1992). The analogy quickly fails upon examination of the controlling facts and law.

First, this case arises from a federal procurement, not state regulation, and therefore no NLRA preemption issue is raised. *See, Brock v. Writers Guild of Am. W., Inc.*, 762 F.2d 1349, 1352 n.4 (9th Cir. 1985) ("issues of preemption are implicated where a state has acted in an area which is reserved to the federal government, in violation of the Supremacy Clause . . . . In contrast, [a challenge to a federal action] raises questions concerning the overlap of two federal statutes."); *see also, Britt v. Grocers Supply Co., Inc.*, C.A. Nos. 91-2493, 91-6043 (5th Cir. Dec. 15, 1992); *United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Tragash v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1976); *cf. New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 539 n.32 (1979). Petitioners cite no case involving federal action of any kind in which a court has applied NLRA preemption principles, nor any case involving federal action which in any way conflicts with the decision below.

Second, there is no ostensible governmental "interference" in this case because the federal government is not imposing any restrictions or compulsions on non-union contractors which affect their rights under the NLRA. Unlike in *Boston Harbor*, there is no privity of contract between DOE and any construction subcontractors. Under the DOE procurement regulations, the MK-Ferguson construction management contract, and the historical M&O contract process, all subcontracts are let by the M&O contractor, not by DOE. The government has no

contractual relationship with—and is imposing no contractual conditions on—construction subcontractors. Thus, this case involves no government-imposed restrictions. *See* M&O Contract, § I, § 7(b) 24-A; 48 C.F.R. § 5204.22 (1990); *US West Communications Services v. United States*, 940 F.2d 622 (Fed. Cir. 1991).

CONCLUSION

The petition should be denied. The *Boston Harbor* case is inapposite to this case and provides no basis for a grant of *certiorari*. Nevertheless, if the Court believes that its resolution of that case will be relevant to its disposition of the petition in this matter, respondents MK-Ferguson and Knoxville Building and Construction Trades Council request that the Court forebear acting upon this petition until it renders a decision in the *Boston Harbor* case.

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December 23, 1992

EDITOR'S NOTE

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No. 92-724

In the Supreme Court of the United States

OCTOBER TERM, 1992

PHOENIX ENGINEERING, INC., ET AL., PETITIONERS

v.

MK-FERGUSON OF OAK RIDGE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and 158(f), expressly permit private employers to implement project labor agreements requiring all subcontractors performing work on a construction project to adhere to collective bargaining agreements that establish uniform terms and conditions.

The question presented is whether the doctrine of implied preemption under the NLRA prohibits a private contractor, retained by a federal agency in its proprietary capacity, from implementing a project labor agreement.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-30A) is reported at 966 F.2d 1513. The several orders of the district court (Pet. App. 32C-36C, 37D-40D, 41E-42E, 43F-49F, and 50G-56G) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1992. A petition for rehearing was denied on July 27, 1992. Pet. App. 31B. The petition for a writ of certiorari was filed on October 26, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the Manhattan Project during World War II, the United States has continuously owned and operated a large industrial complex in and around Oak Ridge, Tennessee. The Department of Energy's (DOE's) Oak Ridge Operations facility (ORO) conducts energy research and development, produces nuclear weapons, and undertakes associated activities. In order to fulfill its atomic research and production responsibilities, ORO necessarily engages in a variety of construction activities, involving both new projects and alteration of existing facilities. See Gov't C.A. Br. 3-5.

Although DOE continually monitors activity at ORO, independent, private sector contractors known as management and operating contractors are responsible for day-to-day operations. See *United States* v. *New Mexico*, 455 U.S. 720, 722-727 (1982); *United States* v. *Boyd*, 378 U.S. 39, 41-43 (1964); *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 234-235 (1952). On April 30, 1990, after competitive bidding, DOE selected respondent MK-Ferguson of Oak Ridge Co. to be its construction manager for the ORO facility effective October 1, 1990. Pet. App. 3A; Gov't C.A. Br. 7.

In the spring of 1990, during the selection process for a new construction manager, a labor agreement between DOE's then-prime contractor for construction services and the Knoxville Building and Construction Trades Council (the Council), an umbrella organization representing craft unions, expired. When negotiations to extend the existing agreement broke down, Council members began a strike at ORO which effectively shut down construction work at the site, including construction of a critical security

project. MK-Ferguson, which by that time had been selected as construction manager, commenced negotiations with the Council. See Pet. App. 3A; Gov't C.A. Br. 7.

Those negotiations resulted in the Project Labor Agreement between MK-Ferguson and the Council, which requires each subcontractor on ORO projects to agree to be bound by the terms set forth in the Project Labor Agreement, and in particular to recognize the unions as the collective bargaining agents for its employees. The Project Labor Agreement also established a hiring hall procedure for the referral of employees, whereby a subcontractor must notify the unions of the number and classification of craft employees needed and allow the unions to supply the employees. Under the agreement, each subcontractor can hire up to four "key" craft employees directly before requesting applicants from the job referral system. Pet. App. 3A-4A, 52G.

2. The Project Labor Agreement became effective on October 1, 1990. On December 3, 1990, petitioners, a group of non-union construction firms, individual construction workers not affiliated with any union, and two contractor associations, filed a complaint in the United States District Court for the Eastern District of Tennessee seeking declaratory and injunctive relief against MK-Ferguson and the Council. Although DOE is not a party to the Project Labor Agreement, did not require MK-Ferguson to enter into the Project Labor Agreement, and played no role in its negotiation, petitioners also sued the United States, the Secretary of Energy, and the manager of DOE's ORO facility (the federal respondents).

Over the course of the proceedings during 1991, the district court denied all relief sought by petition-

ers. First, the district court denied petitioners' motion for a preliminary injunction against enforcement of the terms of the Project Labor Agreement. Pet. App. 50G-56G. Petitioners appealed the denial of the preliminary injunction and sought a stay pending appeal, which the district court denied. Pet. App. 41E-42E. Second, the district court dismissed all labor law claims against the federal respondents, Pet. App. 43F-49F, and granted summary judgment to MK-Ferguson and the Council on petitioners' labor law claims, Pet. App. 37D-40D.[1] The district court ultimately entered a final judgment against petitioners on all claims on October 28, 1991. Pet. App. 32C-36C.

3. The court of appeals affirmed the judgment of the district court.[2] The court acknowledged that, under Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and 158(f), "the Project Labor Agreement would be valid if entered into by a private general contractor." Pet. App. 13A. This conclusion did not suffice to validate the agreement, however, because the court assumed, but did not decide, that DOE was involved in the negotiation of the Project Labor Agreement. *Ibid.*

---

[1] The district court initially declined to dismiss petitioners' claims against the federal respondents and MK-Ferguson under the Competition in Contracting Act (CICA), 41 U.S.C. 253, and the federal acquisition regulations. Pet. App. 48F-49F, 39D. Those claims were subsequently dismissed (Pet. App. 33C-36C), however, and are not at issue in this petition.

[2] Pursuant to the request of the parties, the court consolidated petitioners' appeals from the denial of the preliminary injunction and the entry of a final judgment. Pet. App. 6A.

The court of appeals recognized that this Court has identified two types of labor preemption that limit at least some governmental action: *Garmon* preemption, which prohibits States from "regulat[ing] activity that the NLRA protects [or] prohibits," *Wisconsin Dep't of Industry* v. *Gould Inc.*, 475 U.S. 282, 286 (1986); and *Machinists* preemption, which "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated' " when it enacted the NLRA, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 614 (1986) (quoting *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985)). See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).[a] The court of appeals held that *Garmon* preemption was not implicated because petitioners did not allege that "DOE somehow infringed on the jurisdiction of the NLRB or that the DOE created a regulatory scheme governing conduct prohibited by the NLRA." Pet. App. 15A. The court further held that *Machinists* preemption did not apply because Congress did regulate project labor agreements, specifically allowing them in the construction industry, and because DOE acted as a purchaser in the market place—not as a regulator. Pet. App. 23A-24A. The court therefore concluded that

[a] The court of appeals recognized that this Court has never squarely held that *Machinists* principles restrict the scope of federal agencies' authority. Pet. App. 16A-17A. The court did suggest that the doctrine might apply to DOE, Pet. App. 19A-20A, but it was unnecessary for the court to decide this issue because it determined that *Machinists* principles would not apply to the contract in this case in any event.

"[t]he NLRA does not preempt the action of the DOE in negotiating the Project Labor Agreement in this case." Pet. App. 24A.

ARGUMENT

1. Petitioners contend (Pet. 11) that the courts of appeals are in conflict. We agree. See Brief for the United States as Amicus Curiae in Nos. 91-261 & 91-274, at 9 n.6;[4] compare *Associated Builders and Contractors* v. *Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991) (en banc) (*Machinists* doctrine prevents state agency from implementing project labor agreement negotiated by private construction company), cert. granted *sub nom. Building & Construction Trades Council* v. *Associated Builders & Contractors*, 112 S. Ct. 1935 (1992) (Nos. 91-261 & 91-274 (argued Dec. 9, 1992)) (*Boston Harbor*), and *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991) (*Machinists* doctrine prevents city from implementing project labor agreement), with *Associated Builders & Contractors, Inc.* v. *City of Seward*, 966 F.2d 492 (9th Cir. 1992) (*Machinists* doctrine does not prevent city from requiring project labor agreement), petition for cert. pending, No. 92-709, and *Phoenix Engineering, Inc.* v. *MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513 (6th Cir. 1992) (decision below). The question whether a government agency, acting in its capacity as a purchaser of construction services, may approve or enter into a project labor agreement is currently before the the Court in *Boston Harbor*, Nos. 91-261 & 91-274. Accordingly, the

[4] We have provided a copy of this brief to petitioners' counsel.

Court should hold the petition and dispose of it in light of the decision in that case.

2. If the Court reverses the decision of the First Circuit in *Boston Harbor*, which we have argued as *amicus curiae* is the correct result, then certiorari should be denied in this case. If, however, the Court finds that the state agency's action in *Boston Harbor* is preempted, then this case should be remanded to the court of appeals for full consideration of several issues it did not need to resolve because of its holding on the preemption question.

a. In *Boston Harbor*, the state agency explicitly approved the project labor agreement and, pursuant to state procurement law, actually incorporated it into the bid specifications for the project. See Brief for the United States as Amicus Curiae, at 2-4, in Nos. 91-261 & 91-274. Here, by contrast, there is no governmental involvement in the labor relations between MK-Ferguson and the subcontractors. DOE is not a party to the Project Labor Agreement in this case, and its contract with MK-Ferguson did not give it the right to review or approve the Project Labor Agreement. Although MK-Ferguson employees periodically met with DOE officials during the negotiations to discuss objectives and approaches, DOE did not participate in, direct, or control the negotiations which resulted in the Project Labor Agreement, nor did DOE review or approve the agreement itself. In fact, in addressing petitioners' CICA claim, the court of appeals expressly held that petitioners had not demonstrated that an agency relationship existed between DOE and MK-Ferguson. Pet. App. 29A. Thus, even if *Machinists* principles are applicable to governmental implementation of project labor agree-

ments (the question presented in *Boston Harbor*), the contract in this case can be upheld. Although the court of appeals assumed for purposes of its decision that DOE was involved in the negotiation of the Project Labor Agreement, Pet. App. 13A, it did not need to decide the question due to its resolution of the preemption issue.

b. This case represents a challenge to the contracting practices of the federal government, not a state or local government as in *Boston Harbor*. The doctrine of implied preemption, upon which petitioners rely, is rooted in the Supremacy Clause of Article VI of the Constitution and operates to invalidate state and local action which conflicts with federal law. Application of this doctrine to the congressionally authorized activities of DOE is misplaced. Although this Court has applied *Machinists* preemption only to state and local governmental action, the court of appeals concluded that dicta in *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 110-111 (1989), "seemed to extend *Machinists* preemption to federal action." Pet. App. 17A. Because it found that there was no preemption in any event, however, the court of appeals did not need to resolve the question.[5]

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[5] Executive Order No. 12,818, 57 Fed. Reg. 48,713 (Oct. 23, 1992), essentially forbids the use of project labor agreements on federal or federally funded construction projects. This Executive Order has no bearing on this case: Section 1(c) exempts contracts awarded before the effective date of the order and subcontracts under such contracts, whenever awarded; the contract in this case became effective October 1, 1990. See United States Supp. Br. in Nos. 91-261 & 91-274. (We have provided a copy of this brief to petitioners' counsel.)

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of *Building & Construction Trades Council* v. *Associated Builders and Contractors*, Nos. 91-261 & 91-274 (argued Dec. 9, 1992).

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DECEMBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 80115

Supreme Court, U.S.
FILED
JAN 8 1993
CLERK

No. 92-724

In The

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OCTOBER TERM 1992

PHOENIX ENGINEERING, INC.; TENNESSEE ROOFING CORP.; DEL-AIR SERVICE CO., INC.; LLOYD J. BUNCH; J.C. BIBLE; EAST TENNESSEE CHAPTER ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE, INC., KNOXVILLE BRANCH,

Petitioners,

vs.

MK-FERGUSON OF OAK RIDGE CO.; KNOXVILLE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO; UNITED STATES OF AMERICA; JAMES D. WATKINS; JOSEPH LaGRONE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 92-724

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners Phoenix Engineering, Inc., Tennessee Roofing Corporation, Del-Air Service Company, Lloyd J. Bunch, J. C. Bible, East Tennessee Chapter Associated Builders and Contractors, Inc. and Associated General Contractors of Tennessee, Inc., Knoxville Branch, hereby reply to Respondents' Briefs in Opposition to the petition for writ of certiorari.

1. At the outset, the Solicitor General has conceded that this case presents a direct conflict with the First Circuit's *Boston*

Harbor decision presently pending on writ of certiorari before the Court. Fed. Resp. at 6. The Solicitor recommends that the Court should hold the present petition in abeyance pending the outcome of the *Boston Harbor* appeal. *Id.* at 6-7. Petitioners agree that this is a logical approach. *See* Pet. at 18. [1]

2. Both Respondents have nevertheless attempted to distinguish the *Boston Harbor* case from the present one, on the grounds that the federal government in this case was not in a direct contractual relationship with any of the petitioning construction contractors. However, given the procedural posture of this case, this argument is simply incorrect. Both the district court and the court of appeals took as given the fact that DOE was involved in the negotiation of the Project Labor Agreement at issue and that MK-Ferguson was acting as DOE's agent when administering the Project Labor Agreement at the ORO facility. In this regard, the court below stated as follows:

> The district court assumed that the DOE was involved in the negotiation of the Project Labor Agreement. We adopt this assumption because the nature of the action under review compels us to do so. The district court disposed of the defendants' motions as if they were motions to dismiss. When we review a district court's grant of a motion to dismiss for failure to state a claim on which relief may be granted, all factual allegations are deemed admitted. Here, plaintiffs have alleged that the DOE directed the negotiation of the Project Labor Agreement.

Pet. App. 14-A.

The issue presented for review, therefore, is not whether the government in this case is responsible for the imposition of

---

[1] Although the private party Respondents have not conceded the direct conflict, they too appear amenable to holding the present petition in abeyance pending the outcome of *Boston Harbor*. Resp. Brief at 7.

the union-only requirement on this government project. That fact is affirmatively assumed. Rather, the issue, as stated in the petition, is whether the federal government, when acting directly and through a project manager as its agent, is prohibited by federal labor law from interfering with the process of collective bargaining by requiring private construction employers to sign collective bargaining agreements with a union as a precondition of performing government work. As the court below recognized, this is "exactly the factual scenario" on a federal level, as the *Boston Harbor* case presents on a state level. *Id.* at 18-A. As such, the legal issues are indistinguishable and, as the Federal Respondents concede, a clear conflict exists between the courts of appeals on this point.

3. The Respondents have also suggested that *Boston Harbor* is inapposite because this case involves a challenge to the contracting practices of the federal government, not a state or local government. Such an assertion simply ignores this Court's holding in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), in which the *Machinists* doctrine was clearly extended to cover all direct governmental interference with collective bargaining, regardless of its source:

> In *Machinists*, we reiterated that Congress intended to give parties to a collective bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free from governmental interference. . . . "[T]he Congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct must be free of regulation. The *Machinists* rule creates a free zone from which all regulation "*whether federal or state*," . . . is excluded.
>
> . . . .
>
> The *Machinists* rule is not designed . . . to answer the question whether state or federal regulations should

> apply to certain conduct. Rather, it is more akin to a rule that denies *either sovereign* the authority to abridge a personal liberty. . . . [T]he interest in being free of government regulation of "the peaceful methods of putting economic pressure on one another" . . . is a right specifically conferred on employer and employees by the NLRA.

Id. at 110-112 (emphasis added). Thus, the Respondents' contention that the prohibitions of the NLRA do not apply to the actions of the federal government does not withstand scrutiny and affords no basis for denying the petition.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for writ of certiorari or hold it in abeyance pending the outcome of the *Boston Harbor* case.

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